

(25,378)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 548.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

E. S. HOLLOWAY, AS ADMINISTRATOR OF THE ESTATE
OF JOHN G. HOLLOWAY, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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1 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
E. S. HOLLOWAY, Administrator of the Estate of John G. Holloway,
Deceased, Appellee.

Pleas Before the Honorable Judges of the Court of Appeals of Kentucky, at Frankfort, Kentucky, on the 3rd Day of February, 1916.

Be it remembered that the Appellant, now Plaintiff in Error filed in *in* the Office of the Clerk of the Court of Appeals of Kentucky its transcript, which is in words and figures as follows, to-wit:

2 *Statement.*

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

Appeal from the Henderson Circuit Court.

The names of the parties to this appeal are as stated in the caption. The judgment appealed from was rendered on June 2, 1915, and will be found at page 222 of the record. The appeal was granted below and no summons or warning order is necessary.

Messrs. Clay and Clay, Henderson, Kentucky, are appellee's attorneys.

This is the second appeal of this case and the clerk will please place with the record on this appeal the record on the first appeal, in compliance with rule 7 of this court.

N. POWELL TAYLOR,
JOHN C. WORSHAM,
BENJAMIN D. WARFIELD,
Counsel for Appellant.

December 1, 1915.

STATE OF KENTUCKY,
Henderson Circuit Court:

Pleas Before Honorable J. W. Henson Judge of the Henderson Circuit Court, at the Court House, in the City of Henderson, Kentucky, on Wednesday, June 2d, 1915.

Style of Suit.

E. S. HOLLOWAY, Administrator of the Estate of John G. Holloway, Deceased, Who Sues for the Use and Benefit of Myrtle Holloway, Widow of John G. Holloway, Deceased, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

On December 26th, 1912, the plaintiff filed in the office of the Clerk of the Henderson Circuit Court his petition. Said Petition is here copied:

The plaintiff states that on the 14th day of May, 1912, John G. Holloway died intestate, a resident of Henderson County, Kentucky, and at the time of his death and at the time of the appointment and qualification of his administrator hereinafter set forth there were debts due decedent by citizens of Henderson County, Kentucky, and decedent owned property in Henderson County, Kentucky, which was subject to his debts; and that the plaintiff was and is now a resident of Henderson County, Kentucky. Plaintiff states that on the 25th day of May, 1912, he was, by an order of the Henderson County Court, duly appointed administrator of the estate of John G. Holloway, deceased, and thereupon qualified and is now acting as such administrator. Copies of the order of said Court showing his appointment and qualification are filed herewith as part hereof marked "A."

Plaintiff states that the defendant, the Louisville and Nashville Railroad Company, was at the time of the acts hereinafter complained of, and is now, a corporation created, organized and doing business under the laws of the State of Kentucky, and engaged as a common carrier of freight and passengers between several of the States of the United States, and it has and operates a line of railroad through Henderson County, Kentucky, and has an agent in said County upon whom process may be served.

Plaintiff states that the Senate and House of Representatives of the United States of America in Congress assembled passed and adopted an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," which was approved April 22nd, 1908, and which may be found at 35 Stat. at L. 65, Chap. 149 U. S. Comp. Stat. Supp. 1909, page 1171, and passed and adopted an act entitled—"An Act to Amend an Act Entitled 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,'" "

which amendment was approved April 5th, 1910, and may be found at 36 Stat. at L. 291, Chap. 143. Said laws were in full force and effect at the time plaintiff's intestate was injured and killed on May 14th, 1912, as set forth herein, and are now in full force and effect, and have been in full force and effect since prior to May 14th, 1912. The act and amendment thereto as stated are here copied and quoted below as follows:

"An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

6 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

7 Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

8 Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been

guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to their Employees, approved June eleventh, nineteen hundred and six."

And also:

"An Act to Amend an Act Entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April Twenty-second, Nineteen Hundred and Eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That an Act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty second, nineteen hundred and eight, be amended in section six so that said section shall read:

Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business, at the time of commencing such action, the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said act be further amended by adding the following section as section nine of said act:

12 Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

Now plaintiff states that his intestate, John G. Holloway, was on May 14, 1912, in the employ of the defendant, Louisville and Nashville Railroad Company, in the capacity of engineer of one of its freight trains, which train was composed largely of cars destined to points between different states and shipments of freight destined to places and persons in different states of the Union, some of which originated in Florida and other States, and were billed through the State of Alabama and other states; and while so engaged in interstate commerce by the defendant as aforesaid, and while acting in the discharge of his duties, under his said employment, he was on May 14th, 1912, and within two years next before the institution

13 of this action, between Ft. Deposit and Calhoun in the State of Alabama by, and as the result of, the gross negligence and carelessness of the defendants, its agents, servants and employees, killed, (and his body almost consumed by fire) whereby plaintiff was damaged in the sum of \$50,000.00.

Plaintiff states that John G. Holloway was 34 years of age and in good health at the time he was killed, and left a widow, Myrtle S. Holloway, but no children, surviving him, for whose benefit this action is instituted, under the laws of Congress as above set out.

Wherefore plaintiff prays judgment against the defendant for \$50,000.00 (for the benefit of the widow of John G. Holloway, deceased,) he prays for his costs herein expended and for all proper relief.

CLAY & CLAY,
Attorneys for Plaintiff.

Upon filing the foregoing petition summons and copy was issued to Henderson County. Said summons is here copied:

Summons.

Ordinary Summons.

No. 149. In Ordinary.

14 The Commonwealth of Kentucky to the Sheriff of Henderson County, Greeting:

You are Commanded to Summon Louisville and Nashville Railroad Company to answer in ten days after the service of this summons, a petition against it in the Henderson Circuit Court by E. S. Holloway, administrator of the estate of John G. Holloway, deceased, who sues for the use and benefit of Myrtle Holloway, widow of John G. Holloway, deceased and warn it that upon failing to answer the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within ten days after the service thereof to the Clerk's office of said court.

Given under my hand as Clerk of said court, this 26th day of Dec., 1912.

R. F. CRAFTON, *Clerk.*

The Sheriff's endorsement on the reverse side of said summons is here copied:

Sheriff's Endorsement.

Executed on the within named Louisville and Nashville Railroad Company by delivering to R. W. Powell *against* a copy this 27th day of Dec., 1912.

A. H. ABBOTT, *Sheriff,*
By R. B. EASTON, *D. S.*

At a subsequent day of Jan., 1913, term of Henderson Circuit Court, Wednesday, Jan. 8th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

It is ordered by the court that this case be set for trial on the 31st day of the present term of court.

15 At a subsequent day of Jan., 1913, term of Henderson Circuit Court, Thursday, Jan. 9th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Comes defendant and moves the court to strike from plaintiff's petition herein the following words in the caption to-wit: "Who sues

for the use and benefit of Myrtle Holloway, widow of John G. Holloway, Deceased."

Also, the following words near the bottom of the fourth page of said petition, to-wit: "And his body almost consumed by fire."

Because said words are surplusage and irrelevant and immaterial.

At a subsequent day of Jan., 1913, term of Henderson Circuit Court; Saturday, Jan. 11th, 1913, the following order was interest in the above styled case. Said order is here copied:

Order.

This cause coming on to be heard on defendant's motion heretofore filed on the fourth day of the present term to strike from the caption and plaintiff's petition certain words, and the court being advised sustains said motion.

At a subsequent day of Jan., 1913, term of Henderson Circuit Court; Saturday, Jan., 11th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant and filed a special demurrer to the plaintiff's petition herein and the court being advised overrules said demurrer to which ruling the defendant excepts.

Said Special Demurrer referred to above is here copied:

17

Special Demurrer.

The defendant demurs specially to the petition because this court has no jurisdiction of the parties or of the subject of the action.

And defendant further demurs because of defect of parties plaintiff.

N. P. TAYLOR &

J. C. WORSHAM,

Attorneys for Defendant.

At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Saturday Jan. 11th 1913, the following order was entered in the above styled case. Said order is here copied:—

Order.

Came the defendant by attorney and filed a general demurrer to plaintiff's petition herein. Said demurrer for the present continued.

Said General demurrer referred to above is here copied:

18

General Demurrer.

The defendant demurs to the petition, because it does not state facts sufficient to constitute a cause of action.

N. P. TAYLOR &
J. C. WORSHAM,
Attorneys for Defendant.

At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Monday Jan. 13th 1913, the following order was entered in the above styled case. Said order is here copied:—

Order.

Came the plaintiff by attorney and filed an amended petition herein.

Said Amended Petition referred to above is here copied:—

Amended Petition.

Plaintiff, by leave of court, amends his petition herein and for amendment states, that his intestate John G. Holloway, was killed either by a collision of the train of defendant upon which
19 plaintiff's intestate was at the time employed and another train of defendant's, at the time and place and in the manner stated in his petition, or was buried under and crushed and killed, or was burned to death in a fire which broke out in, the wreck caused by the collision of the train upon which plaintiff's intestate was engineer and another train of defendant, one of which is true but plaintiff does not know which; the said collision, wreck, fire and death of John G. Holloway was caused by, and as the result of the gross negligence and carelessness of the defendant, its agents, servants and employees, other than plaintiff's intestate; and defendant was at the time engaged in inter-state commerce with the train upon which plaintiff's intestate was engineer, between several of the states of the United States of America, including the state of Alabama, in which state it operated its line of road whereby plaintiff was damaged as alleged in his petition.

Wherefore plaintiff prays as in his original petition.

CLAY & CLAY,
Attorneys for Plaintiff.

At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Tuesday Jan. 14th 1913, the following order was entered in the above styled case. Said order is here copied:—

20

Order.

On motion of defendant, it is ordered that the demurrer heretofore filed to plaintiff's original petition, is now taken as demurrer

to plaintiff's amended petition and petition as amended, and the court being advised overrules said demurrer to which the defendant excepts.

At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Monday Jan. 27th 1913 the following order was entered in the above styled case. Said order is here copied:—

Order.

Came the plaintiff by attorney and moved that the petition herein be taken as confessed because the defendant has failed to file its answer, to which motion the defendant objects on the grounds of unavoidable obstacles and delays in preparing its answer before this time and the court being advised overrules said motion and defendant is given to and including the 21st day of the present term of court to file its answer herein.

21 At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Tuesday Jan. 28, 1913, the following order was entered in the above styled case. Said order is here copied:—

Order.

Came the defendant by attorney and filed a motion to strike from plaintiff's amended petition certain words, the court being advised overruled said motion, to which ruling the defendant excepts.

Said motion to strike from Plaintiff's amended petition referred to above is here copied:—

Motion to Strike.

Comes defendant and moves the Court to strike from Plaintiff's Amended Petition filed herein the word "either" in the third line thereof; also to strike therefrom the following words "or was buried under and crushed and killed, or was burned to death in a fire which broke out in the wreck caused by the collision of the train upon which plaintiff's intestate was engineer and another train of Defendant's, one of which is true, but Plaintiff does not know which"; also to strike therefrom the words "wreck, fire"; for the reason that all of said words and statements are surplusage and irrelevant and immaterial.

22 At a subsequent day of Jan. 1913 term of Henderson Circuit Court; Wednesday January 29th 1913, the following order was entered in the above styled case. Said order is here copied:—

Order.

Came the defendant by attorney and filed its answer herein. Said Answer referred to above is here copied:—

Answer.

The defendant, the Louisville and Nashville Railroad Company, not waiving its special and general demurrers filed herein and its motion to strike from plaintiff's petition and amended petition, but still insisting upon same, for its answer to said petition and amended petition says:—

It has not sufficient knowledge or information to form a belief and defendant therefore denies that Jno. G. Holloway, deceased, was, at the time of his death, a resident of Henderson County, Kentucky; or that at the time of the appointment or qualification of plaintiff as his administrator there were debts due the said decedent by citizens of Henderson County, Kentucky, or that decedent
23 owned property in said County, which was subject to his debts, at the time of his death.

Defendant denies that the freight train on which decedent was engineer at the time mentioned in petition and amended petition was composed largely or at all of cars destined for points between different states and shipments of freight destined to places and persons in different states in the Union, or that some or any of it originated in Florida or other States or were billed through the state of Alabama or other states; and defendant denies that while decedent was so engaged by the defendant as alleged in the petition and amended petition or that while acting in the discharge of his duties under his said employment he was, on May 14th, 1912, between Ft. Deposit and Calhoun in the state of Alabama, by, or as the result of, the gross negligence or carelessness or any negligence or carelessness of the defendant or its agents, servants or employees, killed.

Defendant denies that the Federal Statutes copied in the petition and relied upon by plaintiff are applicable in this case and it denies that plaintiff has any cause of action against this defendant,
24 because of said Statutes or either of them.

Defendant says that it has not knowledge or information sufficient to form a belief, and it therefore denies that the said Jno. G. Holloway was 34 years of age or in good health at the time he was killed.

Defendant further denies that by reason of any negligence on the part of any defendant's agents, servants or employees plaintiff has been damaged in the sum of \$50,000.00 as prayed in plaintiff's petition, or in any sum whatever.

Defendant denies that John G. Holloway, deceased, was killed either by a collision of the train of defendant, upon which plaintiff's intestate was at the time employed with any other train of defendant at the time and place or in the manner set out in plaintiff's petition or amended petition, or that said John G. Holloway, deceased, was buried or crushed or killed or was burned to death in a fire, which

broke out in a wreck caused by the collision of the train upon which plaintiff's intestate was engineer with any other train of defendant, or at all, or that said Holloway was killed in either manner alleged in the petition or amended petition; defendant denies that any col-

25 lision, wreck or fire or death of Jno. G. Holloway was caused by, or as a result of, the gross negligence or carelessness or any negligence or carelessness of the defendant or its servants or agents or employees. Defendant denies that it was, at the time, engaged in interstate commerce with the train upon which plaintiff's intestate was engineer, between several or any of the State- of the United States of America, including the State of Alabama.

Defendant says that if plaintiff's interstate lost his life in any one of the modes set out in his said petition or amended petition, his said death was caused by the failure on the part of the said John G. Holloway at said times and places complained of to exercise ordinary care for his own safety, that at the times complained of he did not exercise ordinary care for his own safety, and that but for his own carelessness and negligence the injury complained of would not have occurred.

Wherefore defendant prays that plaintiff's petition as amended be dismissed and it have judgment for its costs herein expended and for all proper relief.

N. P. TAYLOR,
J. C. WORSHAM,
Attorneys for Defendant.

26 At a subsequent day of Jan., 1913, term of Henderson Circuit Court; Thursday, Feb'y 6th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Came the plaintiff by attorney and filed its reply to the defendant's answer herein.

Said Reply referred to above is here copied:

Reply.

Plaintiff for reply to defendant's answer herein, denies that the death of his intestate, John G. Holloway, was caused by the failure on the part of John G. Holloway to exercise ordinary care for his own safety, or that he did not exercise ordinary care for his own safety, or that but for his own alleged carelessness or negligence the injury complained of would not have occurred.

Wherefore plaintiff prays as in his petition.

CLAY & CLAY,
Attorneys for Plaintiff.

At a subsequent day of Jan., 1913, term of Henderson Circuit Court, Monday, Feb'y 10th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

By agreement of parties, it is ordered that this case be continued and the plaintiff recover of the defendant *its* costs occasioned by such continuance.

At a subsequent day of May, 1913, term of Henderson Circuit Court; Wednesday, May 7th, 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

It is ordered by the court that the above styled case be set for trial on the 25th day of present term of court.

At a subsequent day of May, 1913, term of Henderson Circuit Court; Monday, June 2nd, 1913, the following order was entered is the above styled case. Said order is here copied:

Order.

Came the defendant by attorney and filed exceptions to questions and answers in the deposition of Brovai Williams and W. H. Taylor, Jr., filed herein.

28 Said Exceptions to depositions referred to above *is* here copied:

Exceptions to Depositions.

The defendant, the Louisville and Nashville Railroad Company, excepts to questions 33, 51 and 52 in the deposition of Brovai Williams filed herein, on the ground that they are incompetent and irrelevant; and excepts to the answer to question 125 on the ground that the witness could not and did not know of the fact concerning which he purported to testify, as indicated by his answers to questions 128 and 129; and excepts to questions 162, 163, 183, 184, 185 and 186 on the ground that they are irrelevant and incompetent.

The defendant excepts to the answer of the witness in the deposition of W. H. Taylor, Jr., to questions 16 and 17 and the answers thereto on page 11 of his deposition on the ground that the whereabouts of the witness after the accident occurred, in which plaintiff's intestate lost his life, is immaterial, and the questions eliciting said answers and the answers thereto are incompetent and irrelevant.

29 (Continued:) Defendant excepts to the answer of the witness J. N. Rollo to question 9 on page 1 of his deposition on the ground that the evidence is hearsay.

The defendant excepts to questions 6, 7, 8, 9, 10, 13, and 14 on page 17 of the said Taylor's deposition and the answer thereto on the ground that they are irrelevant and incompetent; and excepts

to questions 5, 6 and 7 and the answers thereto on page 18 of said witness' deposition on the ground that they are insulting to the witness and are irrelevant and incompetent.

The defendant excepts to question 10 on page 5 of the deposition of W. F. Butts on the ground that it is incompetent and irrelevant. (Cont. on top.)

Defendant excepts to question 7 on page 3 of the deposition of M. T. Bailey on the ground that it is incompetent.

Defendant excepts to questions 1, 2, 3, 4, 5, 6, 7, and 8 and the answers thereto on page 4 of the deposition of M. T. Bailey on the ground that they are incompetent and irrelevant; and excepts to question 5 and the answer thereto on page 9 of the said deposition on the ground that they are incompetent and irrelevant.

Defendant excepts to the answer of witness Borvai Williams to question 88 in his deposition on the ground that it is not responsive to the question, and on the further ground that the witness,

30 as shown by his answer to question 99, did not know what Holloway was doing after he applied the brakes, as stated by the witness he did do.

Defendant excepts to question 7 and the answer thereto of witness W. D. Reynolds on page 6 of his deposition on the grounds that they are incompetent and are based on hearsay.

Defendant excepts to questions 2, 3, 4, and 5, and the answers thereto of the said Reynolds, at page 7 of his deposition, on the ground that the questions are incompetent, and further that the answer to question 2 was based on hearsay.

Defendant excepts to question 10 and the answer thereto on page 7, of the deposition of W. D. Reynolds, aforesaid, on the ground that the question is incompetent and irrelevant, and to the question and answer on the further ground that if intended to impeach the testimony of witness W. F. Butts proper ground had not been laid therefor.

H. P. TAYLOR,
JOHN C. WORSHAM,
Attorneys for Defendant.

At a subsequent day of May, 1913, term of Henderson Circuit Court; Monday, June 2nd, 1913, the following order was entered in the above styled case. Said order is here copied:

31
Order.
Came the plaintiff by attorney and filed an exhibit referred to in plaintiff's petition herein.

Said Exhibit referred to above is here copied:

Exhibit—Apptd. Admr.

Court Convened in Special Session at the Court House in the City of Henderson, Kentucky, Saturday, May 25, 1912.

Judge S. A. Young, Presiding.

John G. Holloway, Adm'r, Apptd.

Came E. S. Holloway and presented a writing by which Mrs. John G. Holloway waives her right to qualify as Administrator of her husband, John G. Holloway, deceased, and requests that E. S. Holloway be appointed as such Administrator.

It is, therefore, ordered that E. S. Holloway be and he is hereby appointed Administrator of the said John G. Holloway, deceased, and as such that he be required to execute bond in the penal sum of

Two Thousand dollars.

32 The said E. S. Holloway qualified as such Administrator by executing bond as required with The American Surety Company of New York as surety and taking the oath prescribed by law. The said bond was accepted and approved by the Court. The name of the said The American Surety Company of New York was signed to the said bond by R. L. Johnson, resident Vice President and Jas. W. Clay, resident Assistant Secretary.

A Copy Attest: C. E. Sugg, Clerk Henderson County Court, by C. K. Sights, D. C.

At a subsequent day of May 1913 term of Henderson Circuit Court, Monday June 2nd 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Parties appeared, by attorneys, and plaintiff appeared in person. the defendant filed an amended answer withdrawing certain denials made in its original answer herein, to the filing of which the plaintiff objects, announcing ready, came the following Jurors to-wit: Wm. Hicks, Homer Gibson, Ben T. White, W. P. Hoggard, C. N. Tillotson, L. B. Eblen, S. A. Farley, E. G. Abbott, B. F. Utley.

33 S. S. Hicks, W. W. Mitchusson, and B. E. Ladd, all of whom were sworn according to law and trial of the case proceeded with. On motion of defendant and by agreement, Miss Augusta Fitz Gibbon, Official Stenographer appeared, and proceeded to take a stenographic report of the evidence herein. At 12 o'clock not having time to complete the trial of the case the Jury was admonished by court as by law required allowed to disperse and directed to be in court at 1:15 o'clock to which time this case is continued. At 1:15 o'clock parties appeared by attorney, and defendant appeared in person, the Jury heretofore empaneled appeared were called and trial of the case proceeded with. At 5 o'clock not having time to complete the trial of the case, the jury was admonished by court as by law required, allowed to disperse, and directed to be in court to-morrow morning at 9 o'clock, to which time this case is continued.

Said Amended Answer referred to above is here is copied:

Amended Answer.

The defendant, L. & N. R. R. Co., by leave of court, withdraw from its answer so much thereof as denies that John C. Holloway lost his life in a collision between the defendant's train on which he was employed as engineer and the work train of defendant, and admits that he lost his life in said collision.

N. P. TAYLOR,
JOHN C. WORSHAM,
Attorneys for Defendant.

At a subsequent day of May 1913 term of Henderson Circuit Court, Tuesday June 3rd 1913 the following order was entered in the above styled case. Said order is here copied:

Judgment.

Parties appeared by attorney, and plaintiff appeared in person, the jury heretofore empaneled appeared, were called and trial of the case proceeded with. At 12 o'clock not having time to complete the trial of the case the Jury was admonished by court as by law required, allowed to disperse, and directed to be in court at 1:15 o'clock, to which time this case is continued.

At 1:15 o'clock parties appeared by attorney, and plaintiff appeared in person, the jury heretofore empaneled appeared, were called and trial of case proceeded with, having heard the evidence received instructions of the court and heard argument of counsel, the jury retired to their room and presently returned into court the following verdict: We the jury find for the plaintiff in the sum of \$32,900.00. Ben T. White, Foreman. It is therefore adjudged that the plaintiff Jno. G. Holloway's Admr. recover of the defendant the Louisville and Nashville R. R. Co. the sum of \$32,900.00 with 6% interest from date until paid and his costs herein expended, for all of which he may have execution.

At the beginning of this trial at the morning session the defendant by attorney, filed the affidavit of John C. Worsham, & N. P. Taylor, and entered the following motion:

The defendant L. & N. R. R. Co. moves the court to discharge the jury from the further consideration of this case on account of the circulation among them of an article concerning the case on trial which appeared in the June 3rd, 1913 issue of the Henderson

Daily Gleaner on the ground that said article and said circulation were prejudicial to the rights of the defendant. Said motion being considered by the court, is overruled, to which ruling the defendant excepts. But thereupon the court duly admonished the jury that if any of the Jurors had read the article published in the Daily Gleaner referred to that they should not allow it to have any effect or be given any weight in making up their verdict and that if they allowed it to have any weight or were in any way influ-

enced by *by* it they would be disregarding and violating their duty as jurors in the trial of this case.

Said Affidavit referred to above is here copied:

Affidavit.

The affiants, N. P. Taylor and J. C. Worsham, state that they are residents of the city of Henderson, Ky.; that the Henderson Daily Gleaner is a newspaper published and circulated in said city; that on the morning of June 3, 1913, while this case was on trial there was published and circulated in said newspaper an article concerning said trial which appeared on page eight of said newspaper, a copy of which is attached hereto as part hereof; that copies of said
37 paper were in the possession of several members of the jury trying this case while in the jury box and immediately before the resumption of the trial from an adjournment of the day before.

JOHN C. WORSHAM.
N. P. TAYLOR.

Subscribed and sworn to before me by N. P. Taylor and J. C. Worsham, this the 3rd day of June 1913.

R. P. GRAFTON, *Clerk*,
By T. D. ALVES, *D. C.*

Said Motion referred to above is here copied:

Motion.

The defendant, L. & N. R. R. Co. moves the court to discharge the jury from the further consideration of this case on account of the circulation among them of an article concerning the case on trial which appeared in the June 3, 1913 issue of the Henderson Daily Gleaner, on the ground that said article and said circulation were prejudicial to the rights of the defendant.

38 Said motion being considered by the court is overruled, to which ruling the defendant excepts. But thereupon the court duly admonished the jury that if any of the jurors had read the article published in the Daily Gleaner referred to that they should not allow it to have any effect or be given any weight in making up their verdict and that if they allowed it to have any weight or were in any way inflamed by it they would be disregarding and violating their duty as Jurors in the trial of this case.

At a subsequent day of May 1913 term of Henderson Circuit Court, Thursday June 5th 1913 the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant by attorney, and tendered and moved to file a motion and reason for a New trial herein, it is ordered that said motion be continued for the present.

Said Motion and Reason for a new trial referred to above is here copied:

39

Motion & Reason for a New Trial.

The defendant, the Louisville and Nashville Railroad Company moves the court to set aside the verdict of the jury and the judgment herein and grant it a new trial for the following reasons, viz:

First. The court erred in overruling defendant's motion to discharge the jury from the further consideration of this case on account of the publication in the Henderson Gleaner on the second day of the trial of same of an article concerning said case, (said motion being supported by affidavits of counsel for defendant, with a copy of said article attached thereto), which article was prejudicial to the rights of the defendant, and was circulated among and read by members of the jury before the resumption of the trial from an adjournment from the preceding day, to which ruling of the court the defendant at the time excepted, and by which ruling defendant was prevented from having a fair trial.

Second. Because the damages awarded the plaintiff by the verdict herein are excessive, and appear to have been given under the influence of passion or prejudice.

40 Third. Because the court erred to the prejudice of the defendant in giving the jury instruction- marked Nos. 1, 2, 3, 4, 5, 6, and 7, to the giving of which the defendant at the time objected and excepted.

Fourth. Because the court erred in refusing to give instructions marked *b, c, d, e, f* and *g*, offered by the defendant, to which ruling the defendant at the time excepted.

Fifth. Because the court erred in refusing to give the peremptory instruction marked *a*, offered by the defendant at the close of all the evidence in the case, to which ruling of the court the defendant at the time excepted.

Sixth. Because the verdict is not sustained by sufficient evidence.

Seventh. Because the verdict is contrary to law for the reason that the damages assessed exceed the pecuniary value of the life of John G. Holloway, deceased, to his estate; and for the further reason that there was no evidence, as will be shown from the official stenographer's transcript of evidence, which is referred to and asked
41 to be considered as a part hereof, showing that the widow of the said decedent, for whose benefit the suit was brought, was dependent upon the said decedent for her support.

Eight. Because the court erred in admitting incompetent and irrelevant evidence offered by the plaintiff, over the objection of the

defendant, as will appear from the official stenographer's transcript of evidence, which is referred to and asked to be considered as a part hereof, to which rulings of the court the defendant at the time excepted.

Nine. Because the court erred in refusing to admit competent and relevant evidence offered by the defendant, as will appear from the official stenographer's transcript of evidence, which is referred to and asked to be considered as a part hereof, to which rulings of the court the defendant at the time excepted.

The defendant states that the errors as above set out materially affected its substantial rights and prevented it from having a fair trial.

LOUISVILLE & NASHVILLE R. R. CO.,
By N. P. TAYLOR AND
JOHN C. WORSHAM, *Attorneys.*

42 At a subsequent day of May 1913 term of Henderson Circuit Court; Saturday June 7th 1913, the following order was entered in the above styled case: Said Order is here copied:

Order.

Came defendant by attorney and filed additional reasons for a new trial herein.

Said Additional reasons for a new trial referred to above is here copied:

Additional Motion & Reason for a New Trial.

The defendant, by leave of court amends the reasons heretofore filed herein in support of its motion for a new trial, and as an additional reason why said motion should be granted states:

That the verdict of the jury and the judgment entered thereon in this case are excessive, and amount to the taking of defendant's property without due process of law, and without compensation, in violation of the fifth amendment of the Constitution of the United States, which defendant pleads and relies on in support of its motion for a new trial herein;

43 That the verdict of the jury and the judgment entered thereon in this case are excessive and amount to the deprivation of defendant of its property without due process of law, and if sustained would amount to a denial to the defendant of the equal protection of the laws, all in violation of the Fourteenth Amendment to the Constitution of the United States, which defendant pleads and relies on in support of its motion for a new trial herein.

LOUISVILLE & NASHVILLE R. R. CO.,
By N. P. TAYLOR &
JOHN C. WORSHAM,
Attorneys.

At a subsequent day of May 1913 term of Henderson Circuit Court Saturday June 7th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Came the plaintiff by attorney and filed two statements of the jurors before whom this case was tried.

44 Said Statement of Jurors referred to above is here copied:

Statement of Jurors.

The undersigned affiants state that they were on the jury which returned a verdict at the present term of the Court in this case, but that we never saw or heard of the publication in the Gleaner in regard to John G. Holloway and that verdict was in no wise controlled or influenced by any such statement.

This June 7th, 1913.

B. F. UTLEY,
W. P. HOGGARD,
HOMER GIBSON,
C. M. TILLOTSON,
S. S. HICKS, AND
B. E. LADD.

Said Statement of Jurors referred to above is here copied:

We, the undersigned jurors, in the case of John G. Holloway's Administrator vs. the L. & N. R. Co. who returned a verdict at the present term of the Court in this case, state that we read the
45 Gleaner on the morning that the verdict was rendered in this case but did not read the article in reference to John G. Holloway but simply glanced over it and did not ascertain what said article was or the facts or statements made in such article, simply a cursory examination without any knowledge of what the article states, and we were in no way influenced in our verdict by such article or any statement outside of the evidence in this case.

E. G. ABBOTT,
W. M. MITCHUSSON,
L. B. EBLEN,
BEN T. WHITE,
W. R. HICKS, AND
S. A. FARLEY.

At a subsequent day of May 1913 term of Henderson Circuit Court Saturday June 7th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Came Miss Augusta FitzGibbon, and filed her account of \$10.00 against the defendant L. & N. R. Co., ordered said account is allowed, and ordered paid.

46 At a subsequent day of Sept. 1913 term of Henderson Circuit Court; Tuesday Sept. 30th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

This cause coming on to be heard on defendant's motion and reasons for a new trial heretofore tendered on 5th day of June 1913, and also on additional reasons for a new trial filed on June 7th 1913, herein, and the court being advised overrules said motion, to which ruling of the court the defendant objects and excepts, and prays an appeal to the Court of Appeals which is granted, and the defendant is given to and including Oct. 20th, 1913, same being the 42nd day of the present term of court, to file a Bill of Exceptions and transcript of evidence herein.

At a subsequent day of Sept. 1913 term of Henderson Circuit Court; Monday Oct. 6th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant and moved the court to require Miss Augusta FitzGibbon the official stenographer of this court, who took
47 the evidence heard on the trial of this case, to require the said official stenographer to make a full and accurate transcript of said evidence to be filed among the papers of this case, and to be used in making up the bill of exceptions to the Court of Appeals.

The motion of defendant, coming on to be heard, it is ordered by the court that Augusta FitzGibbon, official stenographer in this cause is directed to make out a full and accurate transcript of the testimony heard in this case and actually taken by her, for the use of the defendant in the preparation of its appeal.

At a subsequent day of Sept. 1913 term of Henderson Circuit Court; Friday 17th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

The defendant appeared by attorneys and tendered its Bill of Exceptions, and also tendered the official stenographer's transcript of evidence, with Carbon copy thereof, and moved the court that they be signed, and certified, and filed, and made part of the record of this case, which motion is continued for the present.

48 At a subsequent day of Sept. 1913 term of Henderson Circuit Court; Friday Oct. 24th 1913, the following order was entered in the above styled case. Said order is here copied:

Order.

The defendant, Louisville and Nashville Railroad Company, having heretofore tendered its Bill of Exceptions and also the official stenographer's Transcript of Evidence and carbon copy thereof, on its motion said Bill of Exceptions is examined, signed and approved by the court and said official stenographic report of the evidence is examined, signed and attested by the Judge, and is now ordered that they be filed and made a part of the record without being spread on the order book; and it is now certified that said Bill of Exceptions with said stenographic report of the evidence contains all the evidence in the case.

Said Bill of Exceptions referred to above is here copied:

Bill of Exceptions.

Be it remembered that on the trial of this case the oral evidence was taken by Miss Augusta FitzGibbon, official stenographer of this Court, and her Transcript of Evidence certified to by her and approved by the Judge of this court is made a part of this Bill of Exceptions the same as if copied in full herein. Said Transcript of Evidence contains all the oral testimony that was given on the trial, all of the objections and exceptions to such testimony, the ruling of the Court thereon, and all avowals of Counsel, and said Transcript, in duplicate is filed as part hereof and for a identification is marked "X 2."

At the conclusion of plaintiff's oral testimony, as shown by said stenographer's Transcript of Evidence, the plaintiff read the depositions of Brovai Williams, W. K. Colson, Samuel F. Arn, W. F. Butts, W. D. Reynolds and J. N. Rollo.

(The Clerk will here copy the foregoing depositions.)

On March 26th 1913 the plaintiff filed Deposition of Brovai Williams in the office of the Clerk of Henderson Circuit Court. Said deposition is here copied:

Notice to take said deposition referred to above here is copied:

Notice to Take Deposition.

The defendant is hereby notified that the plaintiff will on Monday, the 24th day of March, 1913, at the law office of Clay and Clay, in the City of Henderson, Kentucky, proceed to take the depositions of sundry witnesses, to be used as evidence on behalf of plaintiff on the trial of the above styled case, and will continue the taking from day to day until through.

CLAY & CLAY,
Attorneys for Plaintiff.

We accept service of the above notice.

JOHN C. WORSHAM,
Attorney for Defendant.

Deposition of Brovia Williams.

The deposition of Brovoi Williams, taken at the law office of Clay & Clay, in the City and County of Henderson, State of Kentucky, on the 24th day of March, 1913, between the hours of eight o'clock A. M. and six o'clock P. M., pursuant to notice hereto attached, to be read as evidence on behalf of the plaintiff on the trial of the case now pending in the Henderson Circuit Court, wherein E. S. Holloway Administrator, &c., is plaintiff and the Louisville and Nashville Railroad Company is defendant:

The witness being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

51 Direct examination by James F. Clay, attorney for plaintiff:

Q. 1. What is your name?

A. 1. Brovai Williams.

Q. 2. Where do you live?

A. 2. I stay in Pensacola, Florida.

Q. 3. How long have you lived there?

A. 3. Been staying there about four years.

Q. 4. What employment were you in May, 1912?

A. 4. I was fireman.

Q. 5. What were you firing on?

A. 5. I was firing on 1231 locomotive.

Q. 6. On what road

A. 6. L. & N.

Q. 7. Was there any train being hauled by that locomotive at that time in May, when the collision occurred?

A. 7. Yes, sir, it had a train.

Q. 8. Between what points?

A. 8. Train running from Pensacola, Fla., to Montgomery, Alabama.

52 Q. 9. Who was the engineer of the train, if you know, in a collision that occurred on the L. & N. Railroad in May, 1912, between Montgomery and Ft. Deposit, Alabama?

A. 9. Mr. Holloway.

Q. 10. What year and month did the collision occur?

A. 10. 1912, 14 day of May.

Q. 11. What was your position on the road, if you held any position, at that time?

A. 11. Fireman.

Objection sustained.

Q. 12. Do you know whether or not John Holloway, the engineer of that train, was killed at that time, if so state?

A. 12. Yes, sir, he was killed at that time.

Q. 13. How did the collision happen?

(Obj. overruled; ex.)

A. 13. It was a head on collision.

Q. 14. What was the character of the train which was being hauled by the locomotive on which you were fireman,—freight passenger or what kind of a train?

A. 14. Freight train.

Q. 15. Were you going north from Pensacola or going south?

A. 15. North, the train I was on was.

Q. 16. How many cars were being hauled by the locomotive at that time?

A. 16. Close as I can get to it, about thirty (30) cars.

Q. 17. Thirty cars.

A. 17. Yes sir.

Q. 18. Do you know the names or remember what cars were in that train, or any of them?

A. 18. No, sir, I didn't pay any attention at all.

Q. 19. You say you had a head on collision?

A. 19. Yes sir.

Q. 20. Was it with a train?

A. 20. Yes sir.

Q. 21. If you know *what* the character of the train with which that train colli-ed, state?

A. 21. It was a work train.

Q. 22. Where was that train from?

A. 22. It was headed toward Pensacola.

Q. 23. It was headed south then?

A. 23. Yes, sir.

Q. 24. Now state if you know, just what happened at that time, all you know about it in connection with Mr. Holloway?

A. 24. We stopped at Ft. Deposit, and while I was blowing the ash pan Mr. Holloway went in the office there. Whether he got any orders I could not tell, I didn't see any. When he got back to the train, he told me to wait until we got out of Ft. Deposit to blow out the ash pan. He got up on the engine and started off, and when we got about a mile from the depot he came around and told me to shake my grates. I shaken my grates and we run on a little piece further, and I was standing up holding the chain, like that, and after I put in my fire, and the time I held to the chain, the dead-head fireman, what was on my side on the seat box, say—"O! look a there!" When he hollowered—"O! look a there!" I heard Mr. Holloway apply the brakes and I goes to the gang way and jumps off, and that is all I know.

Q. 25. For what did he apply the brakes?

A. 25. The train was in front of us.

Q. 26. Did he apply the brakes to stop his train?

A. 26. Tried to stop it.

Q. 27. You jumped off?

A. 27. Yes, sir.

Q. 28. Was the train moving when you jumped off?

A. 28. Yes, sir.

Q. 29. What distance was the work train away when you saw it?

A. 29. It was about 200 feet, as close as I can get to it.

55 Q. 30. About 200 feet.

A. 30. Yes sir.

Q. 31. How soon after you jumped off did the collision take place?

A. 31. Right together. I could not explain how long it was, it was right on together, not more than a minute.

Q. 32. Was your train going down grade or up grade?

A. 32. Down grade.

Objections overruled. Ex.

Q. 33. Did you meet with any injury at the time of that collision; if so, state what?

A. 33. I got my side broke and my arm here broke. .

Q. 34. Was any signal given or not, by anybody, to the train that you were on?

A. 34. No, sir, not that I seen or heard.

Q. 35. Could you have seen any signal if it had been given?

A. 35. If I had seen it the boy would have stopped the engine.

Q. 36. You didn't see, but you could have seen it if it was there?

A. 36. I could a heard a torpedo, but could not have seen the flagman, because I was in front of the fire box.

56 Q. 37. You were on that train coming from Ft. Deposit to Montgomery at the time of collision?

A. 37. Yes sir.

Q. 38. Was there any torpedoes exploded at any time after you left Ft. Deposit?

A. 38. I didn't hear any.

Q. 39. Could you have heard them?

A. 39. Yes, sir, I could have heard them.

Q. 40. Did you see any flagman or hear any torpedo 1,500 feet from the front of that work train?

A. 40. No, sir, I didn't see the flagman or hear the torpedoes.

Q. 41. If there had been a flagman or a torpedo exploded at that point, would you have heard it?

A. 41. I could have heard the torpedo all right.

Q. 42. Was there any torpedo exploded 3,000 feet from the front of the work train?

A. 42. No, sir, not as I heard.

Q. 43. Would you have heard it if it had been exploded?

A. 43. Yes, sir.

Q. 44. If two torpedoes had been exploded at 2,100 feet in the front of the work train, could you and would you have heard them?

57 A. 44. Yes sir.

Q. 45. Did the work train or locomotive with which you collided give any whistle before you struck it?

A. 45. I can remember one blow.

Q. 46. You say this was on a descending grade?

A. 46. Yes, sir.

Q. 47. And that no torpedoes were exploded and that no signal was given to you or to your train?

A. 47. Not as I heard or saw.

Q. 48. And you would have heard if the torpedoes had been exploded?

A. 48. Yes, sir.

Q. 49. Did you see any flagman at the time or after the collision?

A. 49. The flagman come up there about twenty minutes after the collision.

Q. 50. Twenty minutes after the collision?

A. 50. Yes, sir.

Objections. Sustained.

Q. 51. When you were hurt who picked you up?

A. 51. Mr. Goldrene and some more colored fellows.

Q. 52. Were they employees of any train?

Q. 52. Mr. Goldrene was engineer and West Burks was fireman and the other were section hands.

58 Q. 53. Where should the flagman have been at the time of this collision?

A. 53. Should have been on the engineer's side, on the right hand side.

Q. 54. What time of the day did this happen?

A. 54. Close as I can get to it, about 2:40.

Q. 55. In the afternoon?

A. 55. Yes, sir, in the afternoon.

Q. 56. You say you had been working about four years?

A. 56. Yes, sir.

Q. 57. For what road?

A. 57. L. & N. out of Pensacola.

Q. 58. How long had you been in the position of fireman before this collision?

A. 58. Four years.

Cross-examination by John C. Worsham, attorney for defendant:

Q. 59. How far from Ft. Deposit was the place where the collision occurred?

A. 59. I could not exactly tell, not much over three miles.

Q. 60. Did you begin firing the engine as soon as you left Ft. Deposit?

59 A. 60. No, sir, shook my grates after a mile from Ft. Deposit, and put in a little fire after a little time passed. I was standing up there with my hold to the chain and I heard the dead-head fireman holler, "Oh! look a there," and I rushed to the gang way.

Q. 61. You rushed to the gang way and looked out, was that when you saw the work train on the track?

A. 61. When I heard that fireman say "Look a there" that was when I saw the work train.

Q. 62. You stepped then over from the front of the fire box to the side of the engine and looked north towards Montgomery?

A. 62. Yes, sir.

Q. 63. That was when you first saw the engine?

A. 63. Yes, sir.

Q. 64. Was that the time the work train blew that whistle you spoke of?

A. 64. I did not say the work train blew a whistle, I just heard some whistle blow.

Q. 65. Were there any other engines on the track at that point or that you could see except the engine of the work train and the engine on which you were fireman.

A. 65. They were the only two I could see.

Q. 66. Now was the whistle which you heard blown by the engine of the work train or by Mr. Holloway?

60 A. 66. I don't know which blew the whistle.

Q. 67. Was the whistle blown about the time you jumped?

A. 67. I heard the whistle blown, but I could not say which engine blew it.

Q. 68. The whistle was blown before you saw the work train engine, was it not?

A. 68. If it had been blown before I saw the work train engine I could have told which it was, but I didn't hear no whistle before that.

Q. 69. Then you saw the engine and heard the whistle at the same time?

A. 69. No, sir.

Q. 70. How far was the engine on which you were fireman from the work train when you jumped?

A. 70. About 200 feet, as close as I can get to it.

Q. 71. You commenced shaking the grate about a mile out from Ft. Deposit?

A. 71. Yes, sir.

Q. 72. You had been shaking the grate and firing from that time on until you jumped, first one and then the other?

A. 72. Yes, sir.

61 Q. 73. Now you didn't know whether any torpedo was exploded between Ft. Deposit and the place of this wreck?

A. 73. If there had been any exploded, I would have heard it.

Q. 74. Firing and shaking the grate and the running of the engine makes a noise?

A. 74. It makes a noise all right, but I have heard them lots of times when I was putting in the fire, and I didn't hear any that day.

Q. 75. You say you have heard them when you were firing?

A. 75. Yes, sir, but I didn't hear any that day.

Q. 76. How fast was the train going at the time it occurred or before it occurred?

A. 76. About 50 miles an hour.

Q. 77. This point was down grade, was it not?

A. 77. It was down grade.

Q. 78. Were there any curves at that point?

A. 78. Yes, sir.

Q. 79. About how many freight cars in the train?

A. 79. About thirty.

Q. 80. Were they loaded ?

A. 80. I could not exactly tell you, some were loaded.

62 Q. 81. What was your scheduled time for running a train at that point?

A. 81. I could not tell you.

Q. 82. Don't know about that?

A. 82. No, sir.

Q. 83. When the dead-head fireman that was on your side of the engine hollowed "Look a there," you stepped over and saw the work train on the track and jumped?

A. 83. Yes, sir.

Q. 84. That was at the time the dead-head fireman hollowed "Look a there"?

A. 84. Yes, sir.

Q. 85. Was he on the same side of the cab of the engine you were?

A. 85. He was on the fireman's seat.

Q. 86. In an engine going north, would the fireman's seat be on the left hand or right hand side of the engine?

A. 86. Would be on the left hand side of the engine.

Q. 87. At the time the dead-head fireman hollowed, Look a there, Mr. Holloway applied the brakes did he?

A. 87. Yes, sir.

Objected to by defendant.

63 Q. 88. Was there anything to prevent his jumping from the engine like you?

A. 88. Yes, sir, he could not get out time enough to jump, unless he jumped out of the window.

Q. 89. Where was he seated at the time you jumped?

A. 89. On the engineer's seat.

Q. 90. Where was the dead head fireman seated at the time you jumped?

A. 90. He was seated on the fireman's seat.

Q. 91. Now the only difference between the engineer's seat and the fireman's seat is that the fireman is on the left hand side of the engine and the engineer's is on the right hand side of the engine?

A. 91. Yes, sir, that is it.

Q. 92. Did the dead head fireman jump?

A. 92. I could not tell you, I don't know what became of him.

Q. 93. How far is it from the fireman's seat to the gang way?

A. 93. He's got to make two or three steps before he can step down.

Q. 94. The engineer would also have to make two or three steps before he could get down?

64 A. 94. Yes, sir.

Q. 95. How long would it take to take two or three steps?

A. 95. It would not take two or three minutes.

Q. 96. It would just take a fraction of a minute, two of three seconds?

A. 96. Owing to how you got things fixed, the seat's liable to be set up and you have to step over that.

Q. 97. Isn't it a fact that all you have to do in order to reach the gang way from the engineer's seat or the fireman's seat would be just to take a step, and you are right there, and it would take only a fraction of a minute?

A. 97. You could get out of there pretty quick.

Q. 98. Still you didn't know what Mr. Holloway did after he applied the brakes, do you?

A. 98. No, sir.

Q. 99. You don't know whether he attempted to get down or not?

A. 99. No, sir.

Q. 100. After the dead-head fireman hollowed, did you see Mr. Holloway any more?

A. 100. I only heard him.

Q. 101. You heard him, Holloway, apply the brakes?

65 A. 101. I heard him apply the brakes.

Q. 102. With reference to the engine, where were you standing at the time you heard the fireman hollow?

A. 102. I was standing near the fire door, had hold to the fire door chain.

Q. 103. How far is the fire door from the gang way?

A. 103. About five steps.

Q. 104. You took those five steps from the fire box to the gang way and jumped off?

A. 104. Yes, sir.

Q. 105. And it would have taken Mr. Holloway two or three steps from the engineer's brakes to the gang way?

A. 105. Yes, sir.

Q. 106. You paid no attention to what anybody on that engine did after you saw the work train, but made your own jump from the engine?

A. 106. Yes, sir.

Q. 107. And just simply wanted to get out yourself, and were not concerned with what anybody else did?

A. 107. Yes, sir.

Q. 108. You were not keeping any lookout ahead from the time you left Ft. Deposit until you reached the time you jumped?

A. 108. Once in a while I went to the gang way.

Q. 109. For the mile just before you reached the point where you jumped you were busy firing the engine and shaking the ash box, were you not?

66 A. 109. Yes, sir.

Q. 110. You were not attempting to keep any lookout?

A. 110. I was not paying any attention, but the dead-head fireman was looking out and I was working with the fire.

Q. 111. The fireman you speak of was simply dead-head passenger on the engine, and riding on the fireman's seat as a matter of convenience?

A. 111. Going to Montgomery.

Q. 112. He didn't work on that engine?

A. 112. No, sir, he didn't belong there.

Q. 113. Who keeps the look-out on the engine, the engineer or fireman?

A. 113. Both of them when they have got time.

Q. 114. When the fireman is busy with the fires or around the engine, the look-out is kept by the engineer, is it not?

A. 114. Yes, sir.

Q. 115. He is seated on the right hand of the cab?

A. 115. Yes, sir

Q. 116. Now for a distance of 3,000 feet from the time the collision occurred down to the point where you jumped, you were busy with your fire box, were you not; you were not looking out for a signal or doing anything other than to attend to your firing?

67 A. 116. Every once in a while I would go to the gang way, but I didn't stay there any length of time, didn't have time.

Q. 117. What do you mean in shaking down the grate?

A. 117. Shaking the dead stuff out of the fire, making a live fire.

Q. 118. Does that make a good deal of noise and require your attention while you are attending to it?

A. 118. No, sir, that don't make any noise at all.

Q. 119. When you shake down the grates, you are five or six feet in between the middle of the engine with your head below both sides of it, aren't you; in other words, you are kinder in a pocket?

A. 119. No, sir, I would be standing straight up, shaking the grate.

Q. 120. The grate is how many feet below the top of the cab, that is, where your arm rested in looking out?

A. 120. The gates are right below the fire door, right by the fire box.

Q. 121. Is shaking the ashes out of a fire box of an engine about like shaking the ashes or getting the cinders out of a fire grate or any other furnace?

A. 121. About the same.

Q. 122. Makes about the same amount of noise?

68 A. 122. Don't make no noise at all, like the other.

Q. 123. Does it require about the same amount of effort as shaking any other furnace?

A. 123. Unless you got a great many clinkers, it don't make no noise but it is pretty hard to shake it.

Q. 124. Did you have any clinkers in your grate that day?

A. 124. No, sir, that day we had a clean fire.

Q. 125. You didn't know whether the train or the engine in which you were firing was signalled that day by flag?

A. 125. It were not flagged in my judgment.

Ob. Sustained. Exception by Plaintiff.

Q. 126. Did you see the flagman on the right hand side of that train?

A. 126. No, sir. I didn't see any.

Q. 127. Were you looking out ahead where you could see whether the flagman was there?

A. 128. No, sir, I was not looking out; I was standing beside the fire box.

Q. 128. Then you didn't know whether the train was flagged or not, personally, you had no personal knowledge?

A. 128. No, sir, I don't know whether it was flagged or not.

Q. 129. You were not standing where you could have seen it, were you?

A. 129. No, sir.

Q. 130. Did you make a statement on the 9th day of January, 1913, to Mr. C. E. Matthews in which you stated that
69 the work train was from 375 to 400 feet distant from the train on which you were fireman when you first saw it?

A. 130. I pointed him the distance, about how far I thought it was. I didn't tell him nothing about no three hundred feet. Like this, I pointed to a building and told him the distance from where we were standing to a building was the distance between the two trains.

Q. 131. With reference to the court house, there, how far were the two trains apart?

A. 131. Like that, may be a little further.

Q. 132. Was it about as far as over there to the building standing out beyond the court house?

A. 132. About that distance.

Q. 133. You mean from in front of Clay's office in the City of Henderson to the Station House, about that distance?

A. 133. Something like that, yes, sir.

Q. 134. How far away, if you had been on the look out, could the work train have been seen by anyone on your engine?

A. 134. I could not have seen it a bit further than that, if I had been out on the stack.

Q. 135. It could not have been seen any further than where
70 it was first seen by the dead-head fireman, who hollowed, is that a fact?

A. 135. No, sir, it could not.

Q. 136. Why couldn't you see it any further than that?

A. 136. The curves.

Q. 137. When did you first see the flagman who was flagging for the train after you were hurt?

A. 137. They had brought me around on the right hand side of the track and had me laying over there in the shade.

Objections.

Q. 138. How long after you jumped from the engine was it before you saw the flagman?

A. 138. Close as I can calculate, it was about 15 or 20 minutes.

Q. 139. Did he have his flag with him when you saw him?

A. 139. I didn't see no flag.

Q. 140. Where did he come from when you first saw him?

A. 140. Come from the south.

Q. 141. He came from the direction that your train had come from did he?

A. 141. Yes, sir.

Q. 142. How far away was he when you first saw him?

A. 142. He was standing there looking on.

71 Q. 143. The first you saw was when he was there by you?

A. 143. Yes, sir.

Q. 144. That was about fifteen minutes after you were hurt?

A. 144. Yes, sir.

Q. 145. What was his name?

A. 145. I don't know his name.

Q. 146. How far south from the point where the collision occurred is the track down grade. Going north is the track down grade at the point where the collision occurred?

A. 146. It is about seven miles down grade, that is the whole grade.

Q. 147. Going from Pensacola to Montgomery as your engine was going, the track is down grade for about seven miles from the point where it begins to the point where the collision occurred?

A. 147. The whole grade was about 7 miles. We were not more than three miles down grade where the collision occurred.

Q. 148. You had been going down grade for about three miles when the collision occurred?

A. 148. Yes, sir.

Q. 149. How steep is it for those three miles?

72 A. 149. Pretty good grade, pretty steep.

Q. 150. Did the dead-head fireman come out of Pensacola with you?

A. 150. No, sir.

Q. 151. Where did he get on the engine?

A. 151. At a place called Ever-Green.

Q. 152. How long had he been on there when the collision occurred?

A. 152. I don't know exactly, about fifty miles or more.

Q. 153. He was not keeping any look out all that time, just sitting in the cab riding?

A. 153. Between places he was all about on the train, until we came to Ft. Deposit, I got him to cut me some coal down once, and when we got to Georgiana, he came to the engine and sat in the engine until we got to the collision.

Q. 154. He was helping you in your work on the engine?

A. 154. Yes, sir, he helped me once.

Q. 155. He was not on the engine for the purpose of keeping a look out then, but was simply riding there?

A. 156. He was going to Montgomery.

Q. 157. Of your own knowledge, you don't know whether he saw any signals or heard any torpedoes or anything about it?

73 A. 157. No, sir, I never heard him say nothing about it.

Redirect examination by Mr. Jas. F. Clay, att'y for plaintiff:

Q. 158. How far from the place of collision was it that this dead-head fireman helped you?

A. 158. It was on the other side of Ft. Deposit.

Q. 159. He didn't help you after you left Ft. Deposit, doing anything else?

A. 159. He came to the gang way once and got him some water.

Q. 160. What was the name of that dead-head fireman, do you know?

A. 160. Dunk Scott.

Q. 161. Where did he live?

A. 161. In Montgomery.

Q. 162. Where is he now?

(Overruled, Exceptions.)

A. 162. He is dead.

(Object.)

Q. 163. Was he killed in that collision?

A. 163. Yes, sir.

(Sustained, Exceptions.)

Q. 164. Are the brakes right at the side of the engineer?

A. 164. No, sir, above the seat in the locomotive.

Q. 165. Now then after that warning was given and after you first discovered that work train on the track, you say he went to the brakes?

A. 165. I heard the brakes turned on.

74 Objections.

Q. 166. Could he have gotten off that locomotive after he had applied the brakes, as you say he did before the collision took place?

Overruled. Exceptions.

A. 166. I don't think he could.

Obj.

Q. 167. Was the rate of speed at which you were then going, you don't know the exact rate of speed do you, was that the usual rate of speed on a track of that kind?

A. 167. I don't know, sir.

Q. 168. Was that an unusual rate for a clear track at that point?

A. 168. No, sir, I don't know exactly the rule for speed.

Q. 169. Was that the usual rate of speed?

A. 169. The usual rate of speed was 40 miles.

Q. 170. It was going no faster than *than* it usually goes?

A. 170. It seems like to me it was running about 50 miles an hour.

Q. 171. You have been on the train frequently when it ran at that rate of speed on that occasion and on other occasions?

A. 171. Yes, sir.

Q. 172. Was Mr. Holloway, the engineer, constantly engaged from

the time he left Ft. Deposit up to the time of this collision in the performance of his duty, or not?

75 A. 172. I can only give you my understanding,—about a mile away from Ft. Deposit he came to the gang way, after we got a mile away from Ft. Deposit and he told me shake my grates down, and after that he went back, and whether he sat down or stood up I could not tell.

Q. 173. In case of a collision about to occur, do you know what the duty of an engineer would be?

A. 173. Try to stop her if he could, if he had time to stop.

Q. 174. Did he try to stop it?

A. 174. I heard him apply brakes.

Q. 175. Immediately when the dead-head fireman said "look out," did you jump?

A. 175. Yes, sir.

Q. 176. Now in your opinion would it have been possible to have avoided that collision by any means whatever after he applied the brakes?

(Objections Overruled. Ex.)

A. 176. No, sir, he could not have stopped it.

Q. 177. Who was conductor on the train?

A. 177. Conductor Reynolds.

Q. 178. Who was the brakeman, if any, on the train?

A. 178. I don't know all their names, but I think it was Butts. The flagman I don't know him.

76 Q. 179. Don't know what his name was?

A. 179. No, sir.

Q. 180. Are there any cuts or embankments before you get to that curve, or on the curve on which the collision occurred?

A. 180. Yes, sir.

Q. 181. Is it hilly or level? Can you see a long distance or only a short distance?

A. 181. Can't see at all until you get off the curve.

Objections.

Q. 182. Was the work train discovered as soon as it could have been discovered?

(Sustained. Ex.)

A. 182. Yes, sir.

Objections.

Q. 183. Was there any neglect upon the part of the engineer in stopping the train, from the time the work train was discovered up to the time the collision happened?

(Sustained, Ex.)

A. 183. As far as I can see how, he done all that I should think he could do. He applied the brakes, I heard him.

(Objections.)

Q. 184. Was the collision a gentle or severe one?

A. 184. It was dangerous.

(Overruled, Ex.)

77

(Objections.)

Q. 185. What effect did the collision have on the other train, what damage did it do to either the train you were on, and to the other train? (Q. & A. Not read.)

(Question objected to by Counsel for Defense.)

A. 185. I could not tell. I didn't see the engine after they had went together.

Q. 186. Do you know whether the fire occurred on the train you were on after the collision?

(Sustained, Ex.)

(Objection by Counsel for Defense.)

A. 186. I heard fire burning.

Recross-examination by Mr. J. C. Worsham, att'y for deft.:

Q. 187. You say you didn't see Mr. Holloway after he came back to the gang-way, which was about a mile on the other side of Ft. Deposit, going north?

A. 187. No, sir, I didn't know whether he was standing or setting down. He came back and told me to shake down my grates and went back, and I don't know whether he sat down or stood up.

Q. 188. At the time of the collision, you didn't know where he was, whether he was sitting down or standing up?

A. 188. I don't know what position he was in, whether standing or sitting.

78 Q. 189. You don't know whether he was looking out any time after you last saw him in the gang way?

A. 189. No, sir.

Q. The brakes were applied on that engine before you jumped?

A. 190. Yes, sir.

Q. 191. After the brakes are applied or set, that is all that can be done to the brakes?

A. 191. That is all I know can be done.

Q. 192. After the brakes are set, as was done before you jumped nothing more can be done to them?

A. 192. Not to the brakes.

Q. 193. How long does it take to reverse an engine?

A. 193. I don't know, sir.

Q. 194. Isn't all that has to be done in reversing is to pull a lever back?

A. 194. Yes, if she ain't hard to reverse.

Q. 195. Was this engine in good condition that you were riding on?

A. 195. I don't know exactly how she was on the engine side, whether easy or hard to handle, as he never would let me handle that side. The fireman's side was all right.

Q. 196. In an engine where everything is all right, it just takes a very short time to reverse an engine?

A. 196. Yes, sir, you can reverse in a short time.

79 Redirect examination by J. F. Clay, att'y for plaintiff:

Q. 197. Would it have been possible to have reversed that engine and stopped the train before you were striking the other train, in that distance?

(Overruled. Ex.)

A. 197. No, sir, I don't think so.

(Objections.)

BROVIA WILLIAMS.

STATE OF KENTUCKY,
County of Henderson, set:

I, Bessie Clay, a Notary Public in and for the State and county aforesaid, do hereby certify that the foregoing deposition of Brovia Williams was taken before me at the law offices of Clay and Clay, pursuant to notice as stated in the caption, and at the time and place mentioned in the caption; that before giving said deposition the witness was sworn to tell the truth, the whole truth and nothing but the truth relating to said cause; that the answers and questions were taken by me in shorthand notes by agreement of parties, which notes were subsequently transcribed by me, and were read to the witness and subscribed by him in my presence; that the plaintiff was 80 present in person and by James F. Clay, his attorney, and the defendant was present by Attorneys Jno. C. Worsham, and N. P. Taylor.

I further certify that the foregoing is a true and correct transcript made from the shorthand notes so taken by me at the time.

Given under my hand and seal of office this 24th day of March 1913.

[SEAL.]

BESSIE CLAY,
Notary Public, Henderson Co., Ky.

My Commission expires the 28th day of Jan. 1916.

On April 2nd 1913 the Plaintiff filed Deposition of W. K. GOLSON in the office of the Clerk of Henderson Circuit —. Said Deposition is here copied:

The deposition of W. K. Golson, taken *be* agreement at the office of the agent of the L. & N. R. R. Co., in the city of Fort Deposit, Ala., on April 1st, 1913, to be read as evidence in behalf of plaintiff in a case now pending in the Henderson Circuit Court, wherein E. S. Holloway, Admin'r, etc., is plaintiff and the Louisville and Nashville Railroad Company is defendant.

81 The witness being sworn to tell the truth and nothing but the truth testifies as follows:

Direct examination by Clay, attorney for plaintiff:

Q. Please state your name residence and occupation.

A. Walter K. Golson, Fort Deposit, Ala. Operator, L. & N. R. Co.

Q. Were you telegraph operator at this point May 14th, 1912.

A. Yes.

Q. State whether or not you received any message advising you that a work train was occupying the track on the main line between Fort Deposit and Calhoun.

A. No.

Q. State whether or not any message was delivered to train 1st, No. 18, from this office on that date.

A. No.

Q. Will you please examine the records of your office and say what time train No. 17 arrived here from the north and the time train 1st, No. 18 arrived and the departure of each of these trains.

A. Train No. 17 second section, arrived 1.54 P. M. departed 2.28 P. M. Train 1st, 18 arrived 1.47 P. M. departed at 2.02 P. M.

Q. Was train 2nd, No. 17 the last train going south before the wreck.

82 A. Yes.

Cross-examined by N. P. Taylor, for defendant:

Q. Mr. Golson, is it or not the custom for passing trains to receive orders at Fort Deposit, of the presence of work trains on the track between Fort Deposit and Calhoun.

A. No.

Q. Do you know how long this work train had been at work between Fort Deposit and Calhoun?

A. No.

Q. Will you please examine your records and say when 2nd 18 reached Fort Deposit, going north and when it left Fort Deposit on May 14th, 1912.

A. Arrived 1.57 P. M. departed 2.12 P. M.

Q. When a work train is on the main track is it the custom to send orders to passing trains of their presence or is it the custom for work trains to protect themselves by flags or other signals.

A. The rules require that they shall protect by flags or other signals. What I mean by flags or other signals is flags and torpedoes.

W. K. GOLSON,
Operator L. & N. R. R. Co.

STATE OF ALABAMA,
County of Lowndes, *set*:

I, J. D. Lamar, a Justice of the peace, in and for the state and county aforesaid, hereby certify that the foregoing deposition of Walter K. Golson was taken before me in my county in the office of the agent of the L. & N. R. Co. By agreement of the parties at the time and for the purposes mentioned in the caption—that said witness was sworn to testify to the truth and nothing but the truth, before giving *their* depositions and said deposition were read to and subscribed by the witnesses in my presence—both the plaintiff and defendant were represented by attorneys.

Given under my hand this April 1st, 1913.

J. D. LAMAR,
Justice of the Peace of Lowndes Co., Ala.

On April 12th 1913 the plaintiff filed depositions of divers persons in the office of the Clerk of Henderson Circuit Court. Said deposition is here copied:

Subpoena to take depositions referred to above is here copied:

Deposition of Samuel F. Arn.

STATE OF ALABAMA,
Montgomery County:

To any Sheriff of the State of Alabama, Greetings:

84 You are hereby commanded to summon W. F. Butts (at Glenmore Hotel) W. D. Reynolds, (24 South Holt Street) Samuel F. Arn, (54 Pleasant Ave.) J. N. Rollo (14 Eugene St.) Howard McKenzie (510 Jefferson St.) and W. T. Seible (Vandiver Bldg.) personally to be and *and* appear at my office, Room 40 Vandiver Bldg., in the City of Montgomery, on the 29th of March, 1913, and if not on the 29th on the 31st, and if not on the 31st on the last day of April 1913, at 9 o'clock A. M., before me, a Commissioner and Notary Public, in and for said County, in said State, to give evidence and the truth to speak in behalf of the Plaintiff in a suit now pending in Henderson Circuit Court, State of Kentucky, wherein E. S. Holloway, Administrator, etc. is Plaintiff, and the Louisville & Nashville Railroad Company, Defendant; and you will return this writ to me with your endorsement thereon.

Witness my hand, this the 26th day of March, 1913.

IDA LEWIS,
Notary Public, Montgomery Co., Ala., and Commissioner.

Sheriff's endorsement on reverse side is here copied:

85 Executed by serving a copy of the within on W. P. Butts, W. D. Reynolds, S. F. Arns, J. N. Rollo, Howard McKenzie, and W. T. Seibel. This March 31st 1913. H. A. W. Hood, Sheriff, by J. C. Mzell.

Said notice to take deposition is here copied:

The defendant is hereby notified that the plaintiff will, on March 29th, 1913, if not on the 29th, on the 31st, if not on the 31st, on April 1st, 1913, proceed to take the depositions of W. F. Butts, W. D. Reynolds, J. M. Rollo, Howard McKenzie, Sam. F. Arn and W. T. Seible, in the City of Montgomery, County of Montgomery, State of Alabama, at the office of Ida Lewis in Vandiver Building, a Notary Public in and for said County and State aforesaid, and will continue from day to day until through, said depositions, to be read as evidence on behalf of plaintiff on the trial of the above styled case, now pending in the Henderson Circuit Court, wherein E. S. Holloway, Administrator, &c., is Plaintiff and the Louisville & Nashville Railroad Co. is Defendant.

This March 25th, 1913.

CLAY & CLAY,
Attorneys for Plaintiff.

86 The Louisville & Nashville Railroad, by its Attorneys, waives service and accepts service of this notice.

N. P. TAYLOR &
JOHN C. WORSHAM,
Attorneys for Louisville & Nashville Railroad Company.

Depositions referred to above is here copied:—

Deposition of SAMUEL F. ARN, taken at the office of Ida Lewis, in the City and County of Montgomery, State of Alabama, on the 29th day of March, 1913, pursuant to the notice hereto attached, to be read as evidence on behalf of plaintiff on the trial of the case now pending in the Henderson Circuit Court, wherein E. S. Holloway, Administrator, etc., is plaintiff, and the Louisville & Nashville Railroad Company is defendant.

The witness first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:—

Direct examination by Mr. Clay, attorney for plaintiff.

Q. Please state your name, residence, and occupation.

A. Samuel F. Arn. I reside at #34 Pleasant Avenue, Montgomery, Alabama. I am local locomotive engineer for the Louisville & Nashville Railroad Company.

87 Q. How long have you been an engineer for the Louisville & Nashville Railroad Company?

A. Thirteen years.

Q. Do you remember the occurrence of a wreck between Ft. Deposit and Calhoun?

A. Yes, sir.

Q. State as near as you can what time you passed Calhoun on the day of the wreck.

A. I don't believe I can, it was in the afternoon.

Q. Was that before or after the wreck?

A. It was before the wreck.

Q. Can you state the day of the month on which it occurred?

A. No, sir, I cannot.

Q. State whether or not you passed any train at Calhoun.

A. Yes, sir, a work train.

Q. You were going in what direction?

A. South.

Q. As you were going South, please state what you saw between Calhoun and Ft. Deposit.

A. I passed a flagman at the 29-mile post on the Ft. Deposit hill south of where the wreck occurred. He was sitting on the right hand side coming up the hill, in a reclining position, with his head in his hand. He had a flag with him, and he waved his hand at me when I passed by. I met the train that engineer Holloway was on at Ft. Deposit.

88 Q. Did you say anything to engineer Holloway?

A. No, sir, I did not speak. I waved at him and he answered my signal.

Q. What was he doing when you saw him?

A. He was standing at the front of his engine, and seemed to be working on some part of the engine. He and his fireman were together.

Q. What kind of a day was it?

A. It was a fair, warm day.

Q. When you saw Mr. Holloway, state whether or not he seemed to have been hard at work.

A. Yes, sir, Mr. Holloway had a handkerchief in his hand and was wiping his face, and seemed to have been hard at work on some part of the engine.

Q. Mr. Arn, how long have you been running on the M. & M. Division of the Louisville & Nashville Railroad?

A. Nine years.

Q. State whether or not this carries you pass the place where this wreck occurred.

A. Yes, sir.

Q. What is the character of the track from Ft. Deposit to Calhoun?

A. It is down hill, and has a good many reverse curves.

89 Q. Does not the train pass through cuts along the route?

A. Yes, sir.

Q. Going from Ft. Deposit towards Calhoun, how far could an engineer, sitting in his usual place, discover a train on the track where this wreck occurred?

A. I would judge about 12 or 14 cars.

Q. Please give that in feet.

A. Well, there is about 36 feet to the car, so it would be 12 or 14 times 36, which is about 504 feet.

Q. How many cars, as near as you can tell, were in the train Mr. Holloway was pulling?

A. I don't know. I did not pay any attention to the train at all.

Q. I will ask you, Mr. Arn, to state whether or not an engine and train of cars, going at the usual rate of speed along the track between Ft. Deposit and Calhoun where this wreck occurred, could have been

stopped in time to have avoided a wreck, the train being discovered for the first time as you come out of the cut?

A. Well, it would depend entirely on the kind of train and brakes; and also the immediate action taken by the engineer
90 when he discovered the train. There is a great deal of difference in men. Some men act quicker under certain circumstances. With some it would be impossible to make the stop while with others it would not.

Q. Possible to stop in what distance?

A. In a distance of 504 feet.

Q. What kind of train would it be to make it possible to stop in that distance?

A. Train of empty cars.

Q. Do you think a train of loaded cars could be stopped in that distance?

A. It is hard to answer that question.

Q. Say that this train was composed of 30 or 40 cars loaded with rosin, the first two, and such character of freight as comes out of Pensacola.

A. It would hardly be possible to stop.

Q. What is usually considered a good stop for a loaded train composed of 30 or 40 cars, that is, what distance?

A. Making usual speed, 35 miles an hour, about 45 cars.

Q. Mr. Arn, do you know how long Mr. Holloway had been an engineer for the company?

A. No, sir, I do not.

91 Q. I will ask, what is the fair average earning capacity of a railroad engineer on the M. & M. Division of the Louisville & Nashville Railroad?

A. We have two classes in the service. We have some on regular runs that get regular salaries; and then we have a chain-gang first pool, and young men in the chain-gang service second pool. The regular ones get regular salaries: man in first pool will make an average of between \$2,100.00 and \$2,400.00 a year; and the man in second pool should average about \$25.00 to \$50.00 a month, but that depends altogether on the business.

Q. Do you know what class Mr. Holloway was in when he was killed?

A. Second pool service.

Q. Where did this wreck occur?

A. It occurred about one mile south of Calhoun, possibly a little over a mile, on the Louisville & Nashville Railroad, M. & M. Division, on the main line.

Cross-examination by Mr. Taylor, attorney for defendant:

Q. Mr. Arn, on what train were you engineer at the time you passed the point where you have described the wreck to have occurred?

92 A. Second 17.

Q. Your train was going South?

A. Yes, sir.

Q. How long did it take you from the time you passed Calhoun to reach Ft. Deposit?

A. About fourteen or fifteen minutes.

Q. If the train on which Mr. Holloway was engineer, being first 18, had left immediately after you passed Ft. Deposit, how long would it have taken him to reach the point where you had seen the flagman?

A. At the usual rate of speed, about six or eight minutes.

Q. You have stated that when you passed the flagman between Calhoun and Ft. Deposit, he was on your right, how far was he at that time from the cattleguard, which is further South?

A. I should say about 350 or 400 feet, I think.

Q. How far from the track was the flagman at the time you passed him at that time?

A. About 20 or 25 feet.

Q. Did you recognize Taylor?

A. Yes, sir.

Q. You said he waved his hand at you and that he had a flag?

A. Yes, sir.

93 Q. What character of work was being done at the point where the collision occurred?

A. They were either loading or unloading some kind of dirt. I don't know whether they were loading or unloading it.

Q. Do you know how long that kind of work at that point had been in progress?

A. No, sir.

Q. When before had you passed that point?

A. I think some forty-eight hours, going North.

Q. Was there at that time any work in progress at that point?

A. No, sir.

Q. Where does the down grade begin coming North, and what is the length of this grade?

A. It starts right at the north switch at Ft. Deposit, and extends to the North switch at Calhoun.

Q. From the point at the Calhoun grade South of the place where the accident occurred to the place of the accident, can you state the grade?

A. No, sir, I don't know the exact grade, but it is about the same all the way down the hill.

Q. Do you know the schedule time at that point between Ft. Deposit and Calhoun going from Ft. Deposit to Calhoun?

A. You mean the schedule running time of the train?

Q. Yes.

94 A. Different trains have different times between those points. I expect the running time of No. 18 between these two points would be about eighteen minutes. The minimum schedule running time for freight trains is 35 miles an hour on the M. & M. Division.

Q. What would the minimum schedule between Ft. Deposit and Calhoun be per hour?

A. It would be about eighteen miles an hour, that is the schedule running time of the train.

Q. Did you see the work train at Calhoun when you passed Calhoun going South?

A. Yes, sir.

Q. You passed on ahead that work train?

A. Yes, sir.

Q. Who was the engineer on the work train?

A. R. C. Corey.

Q. At the point where the work train stood when the collision occurred, how high were the embankments on the side, if there were any embankments?

A. There was only one embankment on the engineer's side coming down the hill, which must be 12 or 14 feet high.

Q. That embankment would be on the left of Mr. Holloway's train coming North?

A. No, sir, it would be on the right of Mr. Holloway's train coming North.

Q. What other obstruction was there other than the embankment?

A. That was all.

95 Q. Was there any growth of trees or shrubbery?

A. No, sir, nothing but grass. I don't think there were any bushes.

Q. How far from that work train at the point where the collision occurred could an engineer coming North have seen an engine?

A. About 12 or 14 cars. This is just guess work. I don't know exactly.

Q. Would not the top of the engine be visible above the 12 feet embankment?

A. No, sir. If there was any smoke you could see that.

Q. I believe you stated that you did not know how many cars were in Mr. Holloway's train, nor what they were loaded with?

A. No, sir, I do not know.

Q. How should an engineer proceed in order to stop his engine and train in the shortest possible distance.

A. He should use his emergency immediately.

Q. Should he not reverse?

A. No, I do not believe that is necessary.

Q. What length of time would it take an engineer to apply the emergency brake?

A. It would take him about four seconds.

Q. Then could not the engineer set the brakes so he would not need to do anything more to the brakes?

A. Yes, sir.

Q. Then when he had set the brakes, is there anything else the engineer could do to bring his engine to a stop?

96 A. Nothing at all.

Q. On which side of the engine is the engineer stationed?

A. On the right side.

Q. On which side is the fireman?

A. On the left side.

Q. You have spoken of reverse curves on the road between Ft. Deposit and Calhoun, what do you mean by reverse curves?

A. Reverse curve is a curve making two curves, or rather two curves in one. The train will be on two curves at the same time.

Q. Mr. Arn, on that side of the track that the embankment is, about what is the distance from the rail on that side to the embankment?

A. About eight feet.

Q. That embankment is about twelve feet from the level of the track? I mean twelve feet high from the level of the track.

A. Yes, sir.

Q. And the embankment has no growth of trees, bushes or shrubs?

A. I think the grass is all.

Q. Do you think if there had been any smoke from that engine it could have been seen?

97 A. Yes, sir.

Q. For what distance could that have been seen?

A. About the distance of 25 cars from the first point of the curve.

Q. How far from the point where the work train was does this embankment extend towards Ft. Deposit?

A. I really don't know. I think it extends about 40 feet, or something like that. I have not paid any particular attention to this.

Q. This embankment is about 12 feet high from the level of the track where the work train stood, and extended along the track, about 8 feet distance from the rail on that side, for about 40 feet and gradually sloped down?

A. Yes, sir.

Q. Do you know, Mr. Arn, the exact point where the work train stood when the collision occurred?

A. No, sir, I do not know.

Q. Did you, shortly after the collision, see the two engines there at the point?

A. Yes, sir.

Q. After the collision when you saw the engine and the work train where were they with reference to the cut.

A. I suppose they were about 35 feet North of the cut.

Q. On which side of the road?

A. On the right hand side of the road going North, and had rolled down the embankment.

Q. On which side of the road was Mr. Holloway's engine?

98 A. On the right hand side.

Q. They were together?

A. Yes, sir, they were together.

Q. At that point where both of the engines were that you saw, you say the collision occurred 35 feet North of the end of the cut?

A. I did not give this any particular notice. I just remember it from having passed the place.

Redirect examination by Mr. Clay, attorney for plaintiff:

Q. Mr. Arn, in giving the distances that you have, where do you figure the point where the wreck occurred, where you afterwards saw the overturned engines?

A. No, as I stated, I presume they struck some distance from where the engines were over turned, but I don't know just how far. I am satisfied there was a rebound which carried the engines down the hill, but I have no idea what distance.

Q. In giving the distances that you have given, where do you figure the work train to have been standing before the wreck occurred, with reference to where you afterwards saw the over turned engines?

A. I figure the work train in my mind at the extreme North end of the embankment on the right side coming North. I presume the work train was standing at this point, some 10 or 12 feet North of the North end of the cut.

99 Q. How many feet from the place where it over turned?

A. In my mind about 35 or 40 feet.

Q. In speaking of the schedule time of first #18 going North between Ft. Deposit and Calhoun as 18 miles an hour, does that mean that that train should not run any faster than 18 miles an hour between those points?

A. No, sir.

Q. I will ask you to state whether or not first #18 was behind its schedule time on this occasion?

A. Yes, sir.

Deposition of W. F. Butts.

Deposition of W. F. Butts, taken at the same time and place, and for the same purpose mentioned in the caption.

The witness first being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Clay, attorney for plaintiff:

Q. Please state your name, residence and occupation.

A. W. F. Butts, Glenmore Hotel, Montgomery, Alabama, and brakeman on the Louisville & Nashville Railroad.

Q. Do you remember the occurrence of a wreck between Ft. Deposit and Calhoun, Alabama?

100 A. Yes, sir.

Q. Do you remember on what day this wreck occurred?

A. It was on May 14th, 1912.

Q. What kind of trains were they?

A. First 18, freight train.

Q. Going in what direction?

A. North.

Q. Well, what other train?

A. A work train.

Q. In what direction did you say first 18 was going?

A. North.

Q. And the work train was on the main line standing still.

A. I don't know.

Q. Was it a head-on or rear end collision?

A. Head-on.

Q. That was between Ft. Deposit and Calhoun on what road?

A. Louisville & Nashville Railroad.

Q. Were you on either one of these trains?

A. I was on first 18.

Q. As an employeè?

A. Yes, sir.

Q. In what capacity?

A. As Brakeman.

101 Q. Who was conductor of that train?

A. Mr. W. D. Reynolds.

Q. Do you know what time you left Ft. Deposit?

A. No, sir.

Q. You were going North?

A. Yes, sir.

Q. From Ft. Deposit, to, say three miles out, where were you riding on the train?

A. I was on the tender of the engine for about three miles.

Q. After it had been out of Ft. Deposit for about three miles, where then did you go?

A. I was out on the pilot.

Q. The pilot of the engine is what we common folks call cow catcher is it not?

A. Yes, sir.

Q. To get out to the pilot, state whether or not you had to pass through the engine.

A. I come through the cab on the fireman's side around the running board on the left hand side of the engine and stood on the sill of the engine.

Q. What was your object in riding on the pilot of the engine?

102 A. There was a place I was afraid of, and I always got out on the pilot for fear it would turn over.

Q. Your object then in getting out on the pilot of the engine was to get out of a place of danger in the event anything happened to the engine?

A. Yes, sir.

Q. At what point on the road between Ft. Deposit and Calhoun was it that you were afraid of.

A. It is a point just North of the second over-head bridge, North of Ft. Deposit.

Q. Were you out on the cow catcher at that point?

A. Yes, sir.

Q. How far was that from the place where the collision took place?

A. From that bad place I spoke of?

A. Yes.

A. About a mile I suppose.

Q. You say you were out on the pilot for fast running. Just explain what you mean by that, Mr. Butts.

A. Well, it looked to me like it was reckless running the best I can explain.

Q. I will ask you to state whether or not you went out on the pilot for the purpose of cooling off?

A. No, sir.

Q. I will get you to state if you did not tell me last fall in the lobby of the Gay-Teague Hotel here in the City of Montgomery, that you were out riding on that pilot on that occasion because you were hot and went out there for the purpose of cooling off?

A. I told you nothing.

Q. You mean that you did not have any conversation with me about this accident at all?

A. My statement is on the bottom of the statement you gave me.

Q. Will ask you again, Mr. Butts, did you ever have any talk with me about this accident or collision that occurred between Ft. Deposit and Calhoun, Alabama?

A. You gave me a statement and I signed it. It is on the bottom of your statement.

Q. I will ask you if you ever had any conversation with me as to how this wreck occurred, while we were in the lobby of the Gay-Teague Hotel here in the City of Montgomery, in the fall of 1912?

A. Only in accordance with that statement.

Q. By that do you mean to say that you made no statement to me as to how this wreck occurred?

A. My signature there covers my answer.

Q. Was the paper handed to you by me on that occasion?

A. Yes, and presented to Mr. Mizell.

Q. Who is Mr. Mizell?

104 A. Master of trains of the M. & M. Division of the Louisville & Nashville Railroad Company.

Q. Why was the paper presented to you upon that occasion presented to Mr. Mizell?

A. To get information.

Q. Information of what character?

A. As to what I should do. He is my superior officer.

Q. Who did you say Mr. Mizell was?

A. Master of trains M. & M. Division of the Louisville and Nashville Railroad Company.

Q. Do you know where I got the information that was contained in the statement?

A. I do not.

Q. When you went out on the pilot of the engine, you rode with your face in what direction?

A. North.

Q. That was the direction the train was going?

A. Yes, sir.

Q. From the time you left Ft. Deposit to the time the collision occurred, did you see any flagman from the work train?

A. No, sir.

Q. Did first 18, the train on which you were riding, run over any

torpedoes and explode them between Ft. Deposit and the place where the wreck occurred?

105 A. No, sir.

Q. When did you first discover the work train on the track ahead, what distance?

A. I suppose it was about five car lengths.

Q. Could you have discovered it sooner?

A. No, sir, I don't think I could.

Q. You were riding with your face North in the direction the train was going, were you not?

A. Yes, sir.

Q. What was the character of the track as to grade, curvature, cuts, etc., from where the work train was struck South a distance of three thousand feet?

A. It was around a curve and a cut on the East side. I don't know what per cent the grade was.

Q. What is the length of a car?

A. The length of car is about 36 to 40 feet.

Q. How long have you been employed by the Louisville and Nashville Railroad Company?

A. Since April 1st, 1907.

Q. Are you in their employ now?

A. Yes, sir.

Q. What did you do when you discovered the train ahead?

A. I picked a place to jump.

Q. You were riding on which side of the cow catcher?

A. On the West side.

Q. That is on the left hand side of the engine?

106 A. Yes, sir, on the left hand side coming North.

Objected by defendant and sustained.

Q. State what took place after you jumped off, and what happened to the train you were riding on?

A. It was a complete wreck and caught fire and nine or ten cars burned up.

Q. I will ask you whether or not it would have been possible to have stopped that train, after discovering the work train ahead, in time to have avoided that collision?

A. In my judgment it could not.

Objected to by Def't. Objection *excepted*.

Q. Was any one hurt in the wreck?

A. Yes, sir, the fireman and myself. I don't know whether he was an extra fireman, hobo or what he was.

Objection overruled, *excepted*.

Q. Did you see the others?

A. Yes, I saw the fireman.

Q. When the collision occurred, state whether or not there was much noise caused by the compact.

A. I don't know.

Q. You were busy yourself and could not say?

A. Yes, I was pretty busy.

Q. Have you talked to any one as to why you were out on the cow catcher?

107 A. No one.

Q. What was the matter with the track between Ft. Deposit and Calhoun that you say that you were especially afraid of?

A. It is down grade all the way, and just at a point North of this over head bridge it is just a little more so than any other place on the road is the reason I am always afraid to go around there at a high rate of speed.

Q. You say the road just North of the over head bridge the grade along there is a great deal steeper than at other points between Ft. Deposit and Calhoun?

A. Yes, sir, for a very short distance it is.

Q. About what distance?

A. I don't know exactly, probably 100 yards.

Cross-examination by Mr. Taylor, attorney for defendant:

Q. Mr. Butts, what did you say the rate of speed was of this train on which Mr. Holloway was engineer on this occasion from Ft. Deposit to the place where the accident occurred?

A. I suppose it must have been between 30 and 35 miles an hour.

108 Q. You spoke of the place just North of the over head bridge being a steeper grade than any where else between Ft. Deposit and the place of the accident. At that place did the train go faster than it had since it left Ft. Deposit?

A. Yes, sir.

Q. For what distance did that high rate of speed continue?

A. It quickened speed from there to the bottom of the hill.

Q. Where is the bottom of the hill?

A. Calhoun.

Q. On this occasion, do you mean to say that after leaving the last over head bridge this train was running at a higher rate of speed until the collision occurred?

A. Yes, sir.

Q. And it was at this point, at or near the last over head bridge that you left the caboose and went around and got on the pilot of the engine.

A. Yes, sir.

Q. How long did you say it took you, Mr. Butts, to go around the engine and get your seat on the pilot?

A. I did not take a seat. I was standing up on the sill of the pilot.

Q. How long do you suppose it took you to take your place out there?

A. Probably a minute.

109 Q. And you were standing all the time you were out on the pilot?

A. Yes, sir.

Q. And facing North?

A. Yes, sir, the direction is which the train was going.

Q. Now I understand you to say, in answer to one of Mr. Clay's questions, that you left the caboose and went around to the pilot on account of the fast and reckless running of the train at that point?

A. Yes, sir.

Q. Did you or not believe that the position you had on the pilot was the safest place?

A. Yes, sir, I believed it was safer on the pilot.

Q. Now I believe you stated that you were about five car lengths from the work engine when you first saw it?

A. Yes, sir.

Q. And you were about thirty feet from it when you jumped?

A. Yes, sir.

Q. Up to the time when you jumped, had Mr. Holloway set the brakes?

A. No, sir, not to my knowledge.

Q. In the position you were in on the pilot, could you not have felt the brakes if they had been set?

110 Yes, sir

Q. In that position could you have felt and known if the engine was reversed?

A. Yes, sir.

Q. Was the engine reversed?

A. I do not know.

Q. What effect would it have had on the engine if it had been reversed, I mean as to give you a knowledge of it?

A. It would have had a stoppage motion.

Q. Would it have so effected the engine that you would have easily known it had the engine been reversed?

A. Yes, sir.

Q. You did not feel the setting of the brakes or reversing of the engine?

A. No, sir.

Q. Was the train at all slackened in its speed from the time you first saw the work train until you jumped from the pilot of Mr. Holloway's train thirty feet from the work engine?

A. No, sir.

Q. As soon as the work engine was discovered ahead, what was the duty of the engineer with reference to stopping his train?

A. I don't know.

111 Q. You mean to say you do not know the method used for stopping a train?

A. I don't know what the engineer's duties are.

Q. You know that you did not feel the setting of the brakes or the engine reversed.

A. Yes, sir.

Q. Was there any slackening of the speed of the train while you were on it?

A. No, sir.

Q. From the point of the last over head bridge until the collision occurred, what was the rate of speed that Mr. Holloway's train went?

A. I suppose between 30 and 35 miles an hour, according to my best judgment.

Q. Between these points I have just mentioned, his train went faster than it had at any time before since it left Ft. Deposit?

A. Usually it does.

Q. Did it on this particular occasion?

A. I did not notice that particular occasion.

Q. At what point in the cut was the work train when you first saw it?

A. About a mile south of Calhoun.

112 Q. Is that embankment on the east side an abrupt embankment?

A. No, sir, not an abrupt embankment.

Q. Are there any embankments on each side of the rail at the point where the work train was standing when you first saw it?

A. Yes, on the east side, but none on the other.

Q. How high is the embankment at that point above the level of the track?

A. I suppose it is about twelve feet.

Q. Does it or not slope to a less height in the direction that Holloway's train was coming from?

A. Yes, sir.

Q. How close to the north end of this cut was the work train?

A. I cannot say.

Q. Was it closer to the north end of the cut than the south end?

A. Yes, sir.

Q. Then the embankment was on the engineer's side?

A. Yes, sir.

Q. What had been the condition of the brakes since leaving Ft. Deposit?

A. I don't know. They had not been tried.

Q. Before you reached Ft. Deposit?

A. All right.

Q. Was there or not any trouble with the steam after leaving Ft. Deposit?

A. None after we left Ft. Deposit.

113 Q. Was there before you reached Ft. Deposit?

A. Yes, sir.

Q. Had you noticed Mr. Holloway or heard him say anything at the time you reached Ft. Deposit, or just before you reached there, with reference to the steam?

A. Yes, sir. He had complained the whole round trip, and had had two different firemen, and neither one of them kept steam.

Q. Was he or not worried about that matter?

A. Yes, sir, very much worried.

Q. What else did you observe about his demeanor or temper on this particular trip?

A. Nothing except the steam worried him.

Q. That was before you reached Ft. Deposit?

A. Yes, sir.

Q. After the brakes are once set, and after the engine is once

reversed, is there anything more to be done with reference to stopping the train?

A. Nothing, except apply the steam.

Q. When the engine is reversed is that all you can do to stop it?

A. You reverse the engine and apply the steam.

Q. Do you know how that is done?

114 A. Yes, you apply the brakes, apply the sand, reverse the engine, and apply the steam, and if these four things don't work there is nothing else to do.

Q. How are these different things done, by what means?

A. I can't explain that.

Q. I mean, are the brakes set by pulling a lever?

A. They are set by the brake valve, and you reverse the engine by reverse lever.

Q. To do these things, you pull different levers?

A. Yes, sir.

Q. Are not each one of these things done easily and quickly?

A. Very, with an experienced hand.

Q. Do you know whether or not the sand was applied in this case?

A. No, sir.

Q. You were not in position to know or feel when the sand was applied?

A. No, sir.

Q. The train on which you were, first 18, I believe you stated, remained at Ft. Deposit until No. 17 passed going South?

A. Yes, sir.

Q. How far is it from Ft. Deposit to the point where this collision occurred?

115 A. About five miles.

Q. And about one mile South of Calhoun?

A. Yes, sir.

Q. Mr. Butts, do you know what kind or character of hat was worn by Mr. Holloway on that occasion?

A. No, sir, I can't recall positively.

Q. Mr. Butts, have you ever at any time or place or to any person made any other statement with reference to this matter than you had now made in your deposition just given?

A. No, sir, only to the Superintendent.

Q. Have you ever made to him any different statement than you are now making?

A. No, sir, the same statement.

Redirect examination by Mr. Clay, attorney for plaintiff:

Q. I will ask you, Mr. Butts, to please state where this train was made up?

A. It was made up at Pensacola.

Q. Do you know the point of destination of the cars in that train?

A. I do not, but they were going to various places.

Q. Do you know where any of them were destined?

A. No, sir, I do not.

116 Q. This wreck occurred on the main line of the M. & M. Division of the Louisville & Nashville Railroad?

A. Yes, sir.

Q. What experience have you had around locomotive engines?

A. I have had very little experience, except riding on head and about three years as brakeman.

A. Have you ever been in an engine when it was going 25 to 35 miles an hour and seen the engineer apply the brakes?

A. Yes, sir.

Q. After the brakes are applied, how long is it before it takes effect?

A. It depends on the train you have.

Q. Loaded as this train was, how long would it take for the brakes to take effect?

A. Very quickly, particularly gondolas.

Q. Please give me in minutes and seconds as near as you can, how long it would be before the brakes would take effect after they were applied?

A. Immediately.

Q. Is it customary in an emergency to reverse the engine and apply the brakes both?

A. In an emergency, yes.

Q. Have you ever been on an engine when the brakes were applied in an emergency?

A. Yes, sir.

Q. And the engine reversed?

A. Yes, sir.

117 Recross-examination by Mr. Taylor, attorney for defendant:

Q. Mr. Butts, how many of the cars of this train on which Mr. Holloway was engineer, were loaded?

A. I don't know, Mr. Taylor.

Q. Can you say about how many?

A. There were four empties and the balance were loaded, and we had 26 or 27.

Q. You spoke something about gondolas, what do you mean by that?

A. I mean that the brakes hold better on gondolas than they do on others.

Q. What do you call a gondola?

A. Coal cars.

Q. How many were coal cars?

A. I don't remember exactly, but at least, one-half of them were loaded with Mahogany logs.

Q. They were gondolas, or coal cars, and had lumber or logs on them and easier controlled than other cars?

A. Yes, sir.

Also the deposition of W. D. REYNOLDS, taken on the 31st day of March, 1913, at the same place and for the purpose mentioned in the caption.

118

Deposition of W. F. Reynolds.

The witness first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Clay, attorney for plaintiff:

Q. Please state your name, residence and occupation.

A. W. D. Reynolds. I reside at No. 24 South Holt Street in the City of Montgomery, Alabama. I am a freight conductor on the Louisville & Nashville Railroad.

Q. By whom were you employed on May 14th, 1912?

A. By the Louisville & Nashville Railroad Company.

Q. In what capacity?

A. As conductor.

Q. Were you conductor on the train that was wrecked between Ft. Deposit and Calhoun, in the State of Alabama, on May 14th, 1912?

A. Yes, sir.

Q. What kind of train was it?

A. Freight train.

Q. Of how many cars did it consist?

A. Twenty-one cars and two coaches.

Q. Loaded or unloaded?

A. Twenty were loaded, one empty and two coaches.

119 Q. With what were they loaded?

A. Some were loaded with lumber, some with rosin and some with logs.

Q. Can you give the number of those cars in that train?

A. I haven't got them with me. I suppose I can get them, but I don't remember now.

Q. Where was the train made up?

A. Pensacola.

Q. These cars were destined to what points?

A. Different points. Montgomery, Louisville, Cincinnati, and several different points.

Q. What was in the first four cars next to the engine?

A. Lumber.

Q. Was this lumber in gondola cars or box cars?

A. In box cars.

Q. What was the destination of these cars of lumber?

A. They went to Cincinnati.

Q. Do you know what was in the next two cars?

A. It think it was rosin.

Q. Where were they going?

A. I don't know where they went to. I don't remember.

Q. Who composed your train crew on that train?

A. Mr. W. F. Butts, and Mr. H. L. McKenzie.

Q. Who was the engineer and who was the fireman?

A. Mr. Holloway was engineer, and the fireman was named Williams.

120 Q. What time did you leave Pensacola on that trip?

A. I believe it was 2:30 o'clock in the morning. I have forgotten now.

Q. Do you know what time you arrived in Ft. Deposit?

A. No, sir, I don't know exactly what time it was, but I think it was about 1:30 or 1:40, but I don't know about this.

Q. Do you know the time you left Ft. Deposit?

A. I think I got out about 1:50. I don't know exactly as I didn't pay much attention to that, but we only stayed there a few minutes.

Q. Mr. Reynolds, are you acquainted with the rules of the Louisville & Nashville Railroad Company governing the movement of trains, and those that have authority over the trains while they are on the road?

A. I know some of them, but I am not an expert on them.

Q. When a work extra is occupying the main track, what is necessary for it to do?

A. It must protect itself with red flag.

Q. Anything else?

A. They have got to have working limits.

121 Q. I will ask you whether or not the Rule 97-B does not require that when a work extra is working under protection of signals, a brakeman is to notify approaching trains to look out for such work extra at certain point or points; that the conductor of the work extra must write and sign two copies of instructions for each train signal; that the flagman of the work extra must deliver one copy each to the engineer and conductor of all train signals; copies of instructions should be made in writing by use of carbon paper; and as an additional precaution in all such cases, the work extra, when standing at a place where it cannot be plainly seen by an approaching train, must be protected by a second flagman.

A. Yes, sir, that is supposed to be done.

Q. When a freight train is on the road, who has charge of it from the time it leaves until it arrives at its destination?

A. The conductor has charge of it.

Q. I will get you to state whether or not the general direction and government of the Louisville & Nashville train from the time
122 of receiving its passengers or freight until its arrival at its destination is vested in the conductor, and whether or not he is held responsible for its safe and proper conduct, and whether or not all men employed on the train are required to yield a willing obedience to his proper orders?

A. Yes, sir, that is right.

Q. What was the number of this train?

A. First 18.

Q. I will ask you whether or not the general direction of this first 18 was vested in you as conductor; and whether or not all men employed on it, including the Engineer, John G. Holloway, were re-

quired to yield a willing obedience to your proper orders on this occasion?

A. Yes, sir, they were.

Q. What does the Louisville & Nashville Railroad Company require as to delivery of train orders. To whom shall they be delivered?

A. To the Superintendent.

Q. How are they transmitted to the crew?

A. From the operator to the engineer and conductor.

Q. The conductor and engineer are each required to do what after they receive the orders?

123 A. They must read the order back to the operator, and then to each other.

Q. Is the conductor required to read his — the flagman?

A. No, sir, he is supposed to give them to the flagman.

Q. What, if anything, does the engineer do with his?

A. He gives them to the fireman to read, and if he can't read them, he is supposed to read them to him.

Q. Awhile back, you stated that when a work extra occupied the main track under protection of a flag, it was necessary to send out flagman to warn approaching trains, did you not?

A. Yes, sir.

Q. I will ask you how that is done?

A. They give them written instructions.

Q. Up to the time you reached Ft. Deposit had you or not, as the person in charge of that train, or in any way, have knowledge or intimation that there was a work train occupying the main track of the Louisville & Nashville between Ft. Deposit and Calhoun?

A. No, sir.

Q. Did you or not receive any knowledge, information or intimation at Ft. Deposit of that fact?

A. No, sir.

124 Q. How long were you at Ft. Deposit?

A. I suppose we stayed there ten or fifteen minutes.

Q. Did you receive any orders at all?

A. No, sir.

Q. What train passed you at Ft. Deposit while you were on the siding?

A. No train passed me, but I met No. 17 there.

Q. You met 17 at Ft. Deposit?

A. Yes, sir, I met 17 at Ft. Deposit.

Q. Who, if any one, signaled the engineer to go ahead, that is, to proceed out of Ft. Deposit?

A. I give the signal myself.

Q. When that train left Ft. Deposit, state whether or not it had right of track to Calhoun and beyond?

A. Yes, sir, we had right-of-way.

Q. Going toward Calhoun from Ft. Deposit, is the track up grade or down grade?

A. It is down grade.

Q. Describe the nature of the track from Ft. Deposit to the scene where the collision took place.

A. It is pretty cro-ked, and has a good many curves on it.

Q. Is it hilly or level country?

A. It is very hilly.

125 Q. Does the train pass through any cuts?

A. Yes, sir.

Q. From the time you left Ft. Deposit to the time of the collision, did you hear any torpedoes burst?

A. No, sir.

Q. How fast were you running?

A. I suppose we were running about 30 miles an hour, I guess that is about right. Somewhere about that.

Q. At the time, or just immediately before you struck this work train, how fast were you running?

A. About the same.

Q. What was the first intimation that something was wrong?

A. The brakes went on was the first I knew of it, or it slowed up and I thought it was the brakes.

Q. How far could the work train be seen by the engineer on that train where it was standing, back South as your train was coming North?

A. It could have been seen I suppose five or six car lengths, about 100 feet or something like that. It could not be seen very far I know. I believe five or six car lengths would be more than 100 feet though.

Q. You say you felt the brakes go on. Now tell what took place after that?

126 A. Well I felt the train kinder stop. There were two shocks, I don't know what it was. I got up and got a flag out as soon as I could, and then the second shock knocked me down. I discovered that something was wrong at first and started a flag out as soon as I could, and the second shock come and that was harder than the first.

Q. You sent your flag back to warn any approaching trains?

A. Yes, sir, and I went to the front to see what the trouble was, and soon as I could I got up there.

Obj. Sustained. Ex.

Q. Tell what you saw?

A. The first man I saw was Butts. (I asked him what the trouble was. He said he didn't know, but thought we had hit something.) I then saw the train on the other side, and found both engines piled down the embankment and the cars piled on top of them.

Q. Was any one hurt?

A. The fireman was hurt. Had his leg broke, and the engineer was killed.

Q. Did you see the engineer?

A. No, sir.

Q. Do you know whether he was killed by the shock of the collision, or whether he was mashed under his engine, or whether he was burned to death?

127 A. No, sir, I don't know that. He was under there somewhere.

Q. You said these cars were piled up, how many were there?

A. Nine.

Q. Did or not the fire break out?

A. Yes, sir, fire broke out.

Q. Was it possible for you to search for any one buried underneath this wreck?

A. A little while until the fire broke out, and we did search until the fire broke out.

These questions objected by defendant. Sustained.

By plaintiff:

Q. You were going in what direction?

A. We were going North.

Q. In what direction was the train with which you collided going?

A. I think it was headed South.

Q. Do you know whether it was moving or standing still?

A. No, sir, I don't know.

Q. Did Mr. Butts tell you where he was riding just before this collision?

A. Yes, sir.

Q. Why did he say he was riding out there?

A. Said he was hot.

Q. You- fireman, Williams, was he an old man or a new man on that Division?

128 A. He was a new man. We got him in Pensacola.

Q. Had you had any trouble before reaching Ft. Deposit about keeping up steam?

A. Yes, sir, we had trouble with the steam all the way.

Q. Do you know if the fireman, Williams, had been over this route before or not?

A. No, sir, I don't know whether he had or not.

Q. Do the rules of the company require any torpedoes to be placed by a flagman in flagging a train.

A. Yes, sir.

Q. What distance back?

A. He is supposed to go back fifty rail lengths from the caboose and place one torpedo; and he is supposed to go back one hundred rail lengths and place a second torpedo. I mean he goes back this distance and places two torpedoes. I believe as much further again as is necessary to be sure of their safety. Then the flagman is to return to this one torpedo, and when he is called in by the engineer, he removes the one torpedo next to the caboose, and leaves the two for a caution signal to any following trains.

Q. That is the way the rear end of the train is protected, how about the front?

129 A. The same way.

Q. By whom?

A. The front brakeman.

Cross-examination by Mr. Taylor, attorney for defendant:

Q Mr. Reynolds, from the time you left Ft. Deposit on this occasion, on what part of your train, first 18, did you ride?

A. I rode in the rear of the coach next to the caboose.

Q. Were there two empty coaches in addition to the caboose?

A. Yes, sir.

Q. In what part of this coach next to the caboose did you ride?

A. In the rear end of it.

Q. On which side?

A. On the West side.

Q. That would be on the left hand side of the train going North?

A. Yes, sir.

Q. Did you ride the entire distance from Ft. Deposit until the time of the accident in this coach on the side you have just stated?

A. Yes, sir, nearly all the way. I got on the back of the
130 train and went through the caboose, and went into the coach and set down. You might say I was in there all the way for I didn't stop in the caboose.

Q. Well then, in a very few minutes after you left Ft. Deposit, you had taken your seat in this coach on the left hand side of the train next to the caboose.

A. Yes, sir.

Q. And you were sitting in this seat when the collision came, or occurred?

A. Yes, sir.

Q. In that position, Mr. Reynolds, would it have been possible for you to have seen a flagman who was on the right hand side of the train at any point?

A. No, sir, I could not have seen him.

Q. I believe you have stated that there were a number of curves on that road between Ft. Deposit and the scene of the accident.

A. Yes, sir.

Q. Stationed as you were in the coach next to the caboose, how many cars were between you and the engine?

A. There were twenty-one cars and the two coaches, and I sit in the rear end of the rear coach, and there were two coaches and the twenty-one cars.

Q. What is the average length of cars and coaches?

131 A. Cars run from 34 to 36 feet, and the coaches, I forget now how they ran, about 60 feet I believe.

Q. Sixty feet you say?

A. Yes, sir, somewhere about there.

Q. In the position you were, had the engine exploded a torpedo at any time would it have been possible for you to have heard it?

A. I don't think so.

Q. You have stated that the first intimation that you had of any trouble was when you felt a check in the speed, and that you immediately got up, and at once you felt the second shock?

A. Yes, sir.

Q. Can you say and be positive as to whether the first shock you

felt was that occasioned by applying the brakes, or was it the first part of the shock of the collision and the slack being taken up?

A. I think it was the brakes.

Q. When you felt that first shock did you rise to your feet instantly?

A. Yes, sir.

Q. Then immediately as you rose to your feet, did you or not feel the second shock?

A. Yes, sir.

132 Q. You have stated that you got up for the purpose of getting a flag?

A. Yes, sir, to get a flag.

Q. Had you left the seat where you were?

A. I had just stepped to the end of the seat. I was sitting on the arm and just got up and turned around, and the second shock came.

Q. Then it was but a second between the time you felt the first shock and the second shock?

A. Yes, sir, it seemed that way.

Q. Was the car in which you were derailed?

A. No, sir.

Q. How many cars were left on the track?

A. There were nine wrecked and that left twelve cars and the two coaches.

Q. Only nine cars derailed, and the other cars and the two coaches were left on the track?

A. Yes, sir.

Q. You have stated that you thought it was possible for the engineer, Mr. Holloway to have seen the work train ahead of him at that point only a distance of five or six car lengths. Have you or not been there since the accident to take any measurements of the distance that the work train could have been seen from the engine of first 18?

A. No, sir, I haven't been there to measure anything.

133 Q. Have you at any time before or since the accident had any occasion to obtain the exact distance that the work train could have been seen from the engine of first 18?

A. No, sir, I have been by there but have not measured the distance, and don't know the distance.

Q. Did you have the window next to your seat raised?

A. Yes, sir.

Q. Were you or not looking out of the window?

A. I don't know whether I was looking out or not. I was always looking out off and on, but I don't know whether I was at this particular time or not.

Q. Did you at any time while seated by that open window between Ft. Deposit and the scene of the accident see Taylor, or any other flagman or employee of the road on the left hand side of this train going North?

A. No, sir.

Q. Did you hear any whistle blow from the train on which you were conductor just prior to the accident?

A. No, sir.

Q. There was from your engine no whistle or other sound or signal?

A. No, sir, not that I heard.

Q. Do you think from the position in which you were by the open window you could have heard the whistle of your engine?

134 A. Well, I had been hearing it all day.

Q. Did you hear any whistle from the work train?

A. No, sir, I never heard any whistle at all.

Q. Then the first knowledge brought to you of any trouble at that time and place was what you felt when you believed the shock was caused by the application of the brakes?

A. Yes, sir, that was the first thing, and I thought that an air hose had bursted.

Q. In stopping a train in an emergency, is it proper for the engineer to first apply and set the brakes?

A. No, sir.

Q. What is the first thing to be done?

A. He sets the brake in emergency with brake lever on the engine.

Q. That is the first thing to be done in emergency?

A. Yes, sir.

Q. Then does he set the brakes in that position so they will remain set?

A. Yes, sir, they have to remain set until it comes to a stop.

Q. How long should it require the engineer to set the brakes in emergency?

A. About two or three seconds.

135 Q. Is it proper in order to stop a train as soon as possible to reverse the engine?

A. No, sir, I don't think so. I don't know whether they do or not. They could after they set the brakes.

Q. You say your fireman, Williams, was a new man?

A. Yes, sir.

Q. Do you mean to say that he was for the first time passing over that line?

A. I don't know whether he had been over that line before or not. It was my understanding that he had been in Pensacola and had been firing an engine with wood and did not know anything about firing with coal.

Q. Do you know how long he had been in the employ of the company as fireman?

A. No, sir.

Q. They had had some trouble with maintaining steam before they reached Ft. Deposit?

A. Yes, sir.

Q. Before reaching Ft. Deposit; and after leaving Ft. Deposit, there was no trouble with steam on account of its being down hill?

A. No, sir.

136 Q. When the collision occurred, what did you do first?

A. I went to see if the flagman had gone back.

Q. You immediately sent back a flagman?

A. Yes, sir.

Q. For what purpose?

A. To stop the following train.

Q. That was second 18?

A. Yes, sir.

Q. Then what did you do?

A. I went to the front of my train to see what the trouble was.

Q. When after the collision did you first see Taylor, the flagman on the work train?

A. It was some little bit before we got down to the wreck, probably ten minutes, and he come on down to where I was.

Q. Did you see from what direction Mr. Taylor came?

A. From towards my caboose.

Q. What did he have in his hand?

A. A red flag?

A. Did you speak to him?

A. Yes, sir.

Q. What did you say to him?

137 A. I asked him what was the matter, why didn't he flag the train. He said he flagged that man and he paid no attention to him.

Q. Did he say what position Mr. Holloway was in?

A. He said he was laying with his head up in the window like he was asleep. That was all that was said between Taylor and me.

Obj. by Plf. Sustained.

Q. On which side of the road were these cars piled?

A. On the right hand side going North.

Q. Can you say how far back North the work train engine was thrown by the shock of the collision?

A. No, sir, I can't say. I don't know exactly where they were standing.

Q. Then you don't know positively where the engine of the work train was actually standing when the collision occurred?

A. No, sir, I do not.

Q. And you have never gone down the line towards Ft. Deposit for the purpose of ascertaining at what point you can first see an engine at the point where the train stood?

A. No, sir, I never had time. I thought I would ride the engine down sometime but I never did.

138 Q. You have stated Mr. Reynolds, that this train had right-of-way from Ft. Deposit on this occasion to Calhoun, you mean, of course, that that right-of-way was subject to being stopped by red flag?

A. Yes, sir.

Q. Was or was not that the customary way for work train to give notice to approaching trains from the front or rear of their presence on the track?

A. Yes, sir.

Q. Now in that coach in which you were, were or were not the doors of that coach closed?

A. The rear door wasn't closed. I kept that open all the time.

Q. How about the front door?

A. I think that was closed.

Q. Who was your flagman on that occasion?

A. McKenzie.

Q. Where was he stationed?

A. He was sitting on my right hand side.

Q. How long had he been in that position?

A. Since leaving Ft. Deposit.

Q. Did he or not remain there until the shock which you describe?

A. Yes, sir, he was there, and I called to him.

139 Q. When you first saw Taylor after the collision, did you observe anything unusual in his appearance?

A. No, sir.

Q. Noticed nothing unusual about him?

A. No, sir.

Redirect examination by Mr. Clay, attorney for plaintiff:

Q. How fast was that train permitted to go, that is your train, from Ft. Deposit to Calhoun. How many miles per hour?

A. Do you mean under the company's rules?

A. Yes, sir.

A. Thirty-five miles an hour.

Q. What in your opinion is the distance in which the train could be stopped, after emergency had been applied?

A. Do you mean at this place?

Q. Yes, at the place where the wreck occurred.

A. I suppose it could be stopped in a couple of train lengths.

Q. What train lengths?

A. I expect it could be stopped in a train length, I guess it could.

Q. Then you think a train could be stopped by emergency in 850 feet?

140 A. Yes, sir.

Q. You have stated that you were running subject to be stopped by red flag?

A. Yes, sir, that was the only thing that would stop us.

Q. Was anything more required than a red flag?

A. No, sir.

Q. What were the torpedoes placed on the track for?

A. They were supposed to be placed there for caution signals in addition to the red flag.

Q. They are placed on the track to attract attention?

A. Yes, sir, to the engineer so he will slacken his speed when he hits the two torpedoes?

Q. I will ask you whether or not the torpedoes are placed on the track to attract the attention of the engineer so that he may keep a lookout ahead?

A. Yes, sir.

Q. When you felt the first shock just before the collision, what did you do between that time and the time you felt the second shock, as to getting out your flag?

A. I called to my flagman, I got up off the seat and was calling to him all the time.

141 Recross-examination by Mr. Taylor, attorney for defendant:

Q. You called to your flagman all the time you were getting up, did you say?

A. Yes sir, and he was getting up just as fast as he could, too.

Second redirect examination by Mr. Clay, attorney for plaintiff:

Q. Mr. Reynolds, what length of time did it take you to make the run from Ft. Deposit to the place where the collision occurred, as near as you can judge?

A. It must have been seven or eight minutes. I can't tell exactly for I don't know just when we left Ft. Deposit.

Deposition of Sam'l F. Arn.

Mr. SAMUEL F. ARN was recalled by Defendant on Monday, March 31st, 1913.

Q. Mr. Arn, since giving your deposition Saturday, March 29th, 1913, in this case, have you or not been over the line of road between Calhoun and Ft. Deposit and over the scene of the accident, which occurred at that point on May 14th, 1912?

A. Yes, sir.

Q. I will ask you if going over this line since Saturday you made any estimate of the distance between the point where the work train stood on the occasion of the wreck?

A. Yes, sir.

142 Q. And also from the point South where the work train could be first seen by an engine coming North around the curve?

A. Yes, sir.

Q. What distance did you ascertain the work train could be seen coming north around that curve?

A. A man in the cab could see 13 car lengths.

Q. Did you estimate this distance both going from Calhoun towards Ft. Deposit, and coming from Ft. Deposit towards Calhoun?

A. Yes, sir; both ways.

Q. Did you or not make this estimate first while you were going south towards Ft. Deposit?

A. Yes, sir.

Q. How did you arrive at the number of car lengths in that first trip?

A. I had a train of coal going South, with thirteen 80,000 capacity gondolas next to my engine, and the fourteenth car was a hopper. I got the location of the point where the work train was standing, and as I went around the curve, about three or four miles an hour,

I watched for the fourteenth car to come to this point. The end of the thirteenth car was plainly seen, and I could just catch sight of the end of the fourteenth car next to my engine.

143 Q. How high is the embankment where this work train stood?

A. I don't know exactly.

Q. It is not as high as an engine, is it?

A. No, sir; the stack of an engine would be possibly four feet higher.

Q. In your opinion could an engine four feet higher be seen further?

A. Nothing but the stack.

Q. Then on your return going north did you also test this distance?

A. Yes, sir; in the same manner.

Q. With what result?

A. With the same result.

Q. Then in your opinion the distance that the work train could have been seen from an engine was the length of thirteen cars?

A. Yes, sir; thirteen 36 foot cars.

Q. When you speak of a car being 36 feet in length do you mean the box of the car?

A. The body of the car.

Q. That is the length independent of the distance between the cars?

A. Yes, sir.

Q. What is the distance between the cars?

A. I suppose it is three feet to the car, that is one and one-half foot at each end.

Q. What is the distance north of the cut where the work train stood?

144 A. About 35 feet from the extreme North end, and the engine was knocked 35 feet further North before pitching down the embankment, which makes it about 70 feet from the North end of the cut.

Q. Mr. Arn, how did you happen in passing there since giving your deposition here on Saturday, make these observations?

A. After having talked with a number of men on the road who were familiar with the surrounding-, we varied in our opinions as to the distance, and to satisfy my curiosity I made these measurements.

Deposition of Sam'l F. Arn Cont.

Cross-examination by Mr. Clay, attorney for plaintiff:

Q. Mr. Arn, how did you ascertain where the work train was when first 18 came in sight?

A. I ascertained it from the condition of the track and ties where the first lick was struck. The two pilots of the engines coming together scooped out a hole between the rails, and twisted up the ties, and it was easy to tell by these marks.

Also the deposition of J. N. ROLLO, taken on the 31st day of March, at the same place and for the purpose mentioned in the caption.

The witness first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Deposition of J. N. Rollo Cont.

Direct examination by Mr. Clay, attorney for plaintiff:

Q. Please state your name, residence and occupation?

145 A. J. N. Rollo, 14th First Avenue, Montgomery, Alabama, I am conductor on the Louisville & Nashville Railroad.

Q. On May 13th and 14th, 1912, where were you at work?

A. I was on work train on the 14th day of May.

Q. Where were you on the 13th of May?

A. I don't remember just now. I will have to go back to the books to find out whether I was in Montgomery or out.

Q. You were on work train on May 14th, 1912?

A. Yes, sir; I was on work train that day.

Q. Mr. Rollo, to refresh your recollections, were you not on work train on May 13th, 1912, and put up for the night at McGhees?

A. Yes, sir, I believe I was on work train two days, the 13th and the 14th.

Q. How far is McGhees from Montgomery?

A. Why, it is about nine miles.

Q. Who was your head brakeman?

A. Mr. Taylor.

Q. What were his initials?

A. W. H. Taylor, I believe is the way he signed his name.

Q. Where is he now?

A. They tell me he is in jail. I don't know where he is.

Above question and answered objected to by defendant.

Q. What time did you stop work that night of May 13th?

A. As well as I can remember, it was about six o'clock.

Q. Do you know what became of Taylor?

A. What became of him?

146 Q. Yes, that night.

A. Why, you see after I put up at six o'clock, they were not under my charge. I have nothing more to do with them.

Q. I understand that they are not under your charge, but do you know what became of Mr. Taylor?

A. He left the caboose. I couldn't say where he went. I don't know where he went.

Q. State whether or not he caught a train at McGhees after working hours and was coming towards Montgomery.

A. I did not see him catch a train. I couldn't say that.

Q. When you are out on work train, does your crew usually sleep in the caboose, when you are out over night?

A. Yes, sir, they sleep in the caboose.

Q. Did Mr. Taylor sleep in the caboose that night?

A. Yes, sir.

Q. What time did he come in, as near as you can tell?

A. I can't say positively. I asked what time it was and somebody stated that it was about eleven or twelve o'clock. I lay down at the usual time and did not know what time it was.

Q. What was his condition when he came to the caboose?

A. Same as he always was. I didn't see anything unusual about him or his condition.

Q. State whether or not Mr. Taylor said anything to you that day or that night about not having a sufficient number of torpedoes on the train.

A. About not having a sufficient number on the train?

147 Q. Yes, sir, a sufficient number?

A. No, sir; for he had a sufficient number *on* the caboose.

Q. Did he say anything to you about torpedoes?

A. No, sir.

Q. What time did you leave McGhees next morning?

A. Why, I believe we left there at six o'clock.

Q. Do you know where you had been working that day when you pulled into McGhees that night?

A. Yes, sir, I remember.

Q. Where were you working?

A. At Tyson.

Q. That is how far from McGhees, and in what direction?

A. It is south of Montgomery.

Q. Is Tyson between Montgomery and McGhees?

A. No, sir, Tyson is south of McGhees.

Q. About how far south of McGhees?

A. About seven miles I believe.

Q. What time that morning did you start for Ft. Deposit hill?

A. I don't remember just now. It must have been about ten o'clock when I got to work. I did some work at Tyson before I went to Ft. Deposit hill.

Q. What kind of work were you doing on the hill on the 14th day of May?

A. We were unloading cinders.

Q. After you reached Ft. Deposit hill, did you or not instruct Taylor, or any one, what to do?

A. Yes. I instructed Taylor what to do.

Q. What were your instructions to him?

148 A. My instructions to him were to flag all second and inferior class trains, and told him to look out for me.

Q. At the time you were working on the hill, were you working under protection of signals?

A. Yes, sir; I would not have been out there if I hadn't been protected.

Q. This was on the main line track of the Louisville and Nashville Railroad, was it not?

A. Yes, sir.

Q. Tell what is required of a work train when it occupies the main line track as yours did?

A. We have to be protected by flag both ways.

Q. When you were working on the hill, was it at the same place or in different places?

A. I was doing work in the same place.

Q. When was it that you instructed the negro to tell Taylor to move further up the hill, if you did instruct him?

A. I cannot give you the exact minute. I instructed him in the presence of the supervisor and the section foreman. After I let 17 by, I sent the negro out with further instructions to the flagman.

Q. Why did you instruct him to go further up the hill, that is, why did you instruct the negro to tell Taylor to move further up?

A. I wanted him back the proper distance, and instructed him to go to the first over head bridge, where there is almost a half mile straight track and plenty of room to stop any train.

149 Q. Do you know where Taylor had been stationed before you sent the negro to him?

A. No, sir, I didn't go up to where he was. I only know where he told me he was.

Q. Where the negro told you Taylor was stationed?

A. Yes, sir.

Q. Did the negro report to you where Taylor was?

A. Yes, sir.

Q. Where did No. 17 pass you?

A. No. 17, I went to Calhoun to let them by.

Q. Is Calhoun a telegraph station?

A. Yes, sir, it is.

Q. Did you go in the office there?

A. No, sir.

Q. How did you know that 17 wanted to pass?

A. They called me in.

Q. When you went back to Calhoun to let No. 17 pass, did you call Taylor in?

A. No, sir.

Q. Well, after No. 17 passed, what did you do?

A. I followed them out to the work.

Q. How soon?

A. Immediately, just as soon as he cleared.

Q. Did you or not return to the same place you had been working before?

A. Yes, sir, the same place.

Q. What, if anything, did you do to keep the train from going down the hill?

A. What do you mean?

150 Q. I mean, did you have the wheels chocked by any timbers or anything?

A. I had the ties under the wheels, and then had cinders too.

Q. Where and what were you doing while your train was being unloaded?

A. Why, I was around there, got up on the car to see how they finished up.

Q. Did the unloading of cinders there at that time make much fuss or not?

A. No, sir, not very much.

Q. How far from your train was it required that the first torpedo should be placed?

A. Why, he had some torpedoes with him down where he was flagging.

Q. I say, how far from your train do the rules require the first torpedo to be placed?

A. About 1,500 feet, and go still further back 2,100 feet.

Q. Do you know whether or not the explosion of a torpedo could be heard 1,500 feet?

A. I don't know sir, whether it could be heard or not.

Q. What is your best opinion about that?

A. I have no opinion to give in this matter. I had a man out there to carry out the rules, and I give him instructions what to do, and he was examined under the standard rules same as I was.

Q. I will just ask you again your opinion, Mr. Rollo, as to whether or not you can hear the explosion of a torpedo for 1,500 feet?

A. Why, that is hard to give an opinion just on this hill.

Q. What is your best opinion about this matter?

151 A. Well, as I have told you, I have never thought about giving an opinion. I had a man flagging and give him instructions, and he carried them out so far as I know, and I have no opinion to give. I was on the job and had a flag each way.

Q. I will ask you to think about it now, and tell me whether or not in your opinion a person could hear the explosion of a torpedo for 1,500 feet?

A. I suppose you could hear the explosion of a torpedo.

Q. Did you hear any torpedo explode as No. 18 approached?

A. I didn't know 18 was ahead there until it hit me.

Q. Then you did not hear any torpedo explode a very short while before the collision took place?

A. No, sir, I wasn't listening out for torpedoes. I had a man out flagging each way, one South and one North.

Q. Did you know whether or not No. 18 had passed?

A. I knew they had not. I kept a book of all schedule trains.

Q. Did you tell Taylor what trains were due?

A. He had a time card and watch, and I had instructed him to flag second and inferior class trains, and I looked out for first class trains myself.

Q. How long had you been back at work when the collision occurred?

A. I don't know.

Q. How long had Taylor been working for the Company?

A. I don't know.

152 Q. You say he was your head brakeman?

A. Yes, sir.

Q. He was assigned to your run?

A. It wasn't my run. I relieved another man.

Q. How, if you know, was he assigned to your crew?

A. He was working on the work train. I don't know.

Q. Did he or not at any time report for duty to you?

A. He reported on the 13th and 14th.

Q. You have stated that you did not know anything about 18 coming until it struck. What was the first thing that called your attention to No. 18 or any train approaching?

A. I saw it come around the curve. I just had time to call out to the men and get out of the way, that was all the time we had.

Q. Which way were you facing immediately before No. 18 came in sight?

A. Which way was I facing?

Q. Yes, were you facing North or South?

A. I was facing South. I was on the car just before 18 hit me, and I had just got on the ground on the west side of the train.

Q. State whether or not you saw 18 as soon as it made the turn?

A. I did.

Q. Could the train No. 18 have been stopped before the collision took place?

A. Could it have been stopped?

153 Q. Yes, after it came in sight around the curve?

A. I don't suppose it could. The distance was too short for them to stop I suppose.

Q. Was your train standing still or in motion?

A. Standing still.

Q. How far was 18 from the work train when you first saw it?

A. I never measured the distance. I suppose it was about 100 feet, I mean a 100 yards. I have never measured it, and it may be more than that.

Q. What mile posts, if you know, is Calhoun located between?

A. Calhoun is 518. I was working at 519.

Q. You were how far from 519?

A. A short distance. I don't know just how far.

Q. In speaking of the 518 mile post, that is 518 miles from what point?

A. From Louisville.

Q. Is the 518 mile post in Calhoun?

A. Yes, sir.

Q. And you were working how far from the 519 mile post?

A. Just a short distance. I was working right at 519, right close to it.

Q. North or South?

A. South.

Q. What mile posts is Ft. Deposit between?

A. Ft. Deposit is 523.

154 Q. Is the 523 mile post in the village of Ft. Deposit?

A. I cannot say whether it is right in the village of Ft. Deposit or not. I can't give you all the mile posts on the road. I would have to take a day off to spot them; but the station of Ft. Deposit

is 523 and Calhoun 518. I can't give you the exact spot but that is the number of the stations.

Q. As No. 18 came in sight, did your train blow its whistle?

A. Yes, sir.

Q. Was that whistle blown before or after No. 18 came in sight?

A. The engineer got up on the train and tried to move the train but he couldn't on account of the ties and cinders. He made an effort to get out of the way, but he couldn't.

Q. Well then, he blew the whistle you say, Mr. Rollo, but state whether it was before or after 18 came in sight?

A. He blew the whistle as soon as he got on the engine, and he tried to back out of the way.

Q. I understand that, but what I want to know is whether that whistle on the work train was blown before or after 18 came in sight?

A. I guess it was after it came in sight. He didn't know any more about *about* 18 coming than I did.

Q. Could Holloway have stopped his train after that, in your opinion?

A. No, sir, I don't think so.

Q. Just tell, Mr. Rollo, from the time 18 came in sight until the collision happened in your own way?

A. Why, I had a flag out each way, with instructions to flag second and inferior class trains. I had had charge of the work train two days. I didn't know 18 was about until it hit me.

155 Q. Please answer my question. After 18 came in sight, was there a wreck, collision, or what happened?

A. Well, it looked to me like a wreck. A couple of engines turned over and went together.

Q. Any cars piled up on the engines?

A. Why, I think there were two or three, three or four, something like that. I don't remember.

Q. Did fire break out after that?

A. Yes, sir.

Q. State whether or not any one was hurt?

A. I didn't see any body hurt but the fireman.

Q. Did you see Mr. Holloway, the engineer, after the wreck?

A. No, sir, I did not.

Q. What was to prevent your seeing him?

A. Seeing Mr. Holloway?

Q. Yes, sir, seeing Mr. Holloway?

A. Why, I don't understand what you mean?

Q. Did you see the engineer of 18 at any time after the collision?

A. No, sir, I will not.

Q. Mr. Rollo, I will get you to state the character of the road along the points where you were working, and south of where you were working, for say a distance of four thousand feet?

A. Why, there is a hill.

Q. State whether or not there were any cuts?

A. Yes, sir, there were cuts.

156 Q. Was it a straight track or not?

A. It is not a straight track.

Q. Is it not a fact that it was a very crooked track, having reverse curves, down grades and cuts?

A. It is down hill, crooked, and there are several curves. I don't know whether they are reverse curves or not.

Q. Are there any cuts?

A. Yes, there are some cuts.

Q. I will ask you, Mr. Rollo, to state whether or not there are any reverse curves along the Louisville and Nashville track, from a point where your train was located on this occasion, back south four thousand feet?

A. Why, there is a hill, and there are curves on the hill.

Q. Assuming that I do not know what a reverse curve is, will you please state whether or not there are any reverse curves within that distance?

A. Within four thousand feet?

Q. Yes, sir.

A. As I told you before, there is a curve on the hill. It is down hill and curves on the hill.

Q. Mr. Rollo, do you know what a reverse curve is?

A. Yes, sir, I guess I do.

Q. Then will you please state whether there are any reverse curves within a distance of four thousand feet south of where your train was standing when it was struck?

A. As I have told you before, it is down hill and there are curves on it.

157 Q. Mr. Rollo, do you refuse to answer the question I have asked you? What is your answer to that question?

A. I told you in the beginning that I had charge of the train, the work train, and had given instructions as to what to do, and I was on the job, and was doing my part of the duty; and there was a hill with curves on it, and I had a man each way examined by the standard rules of the company same as I was.

Q. Do you know whether or not there were any reverse curves within four thousand feet north or south of where your train was standing?

A. I don't know what you call four thousand feet. There are curves on the hill I have told you three or four different times.

Q. Are there any reverse curves within that distance?

A. I have told you there were curves on the hill.

Q. Yes, Mr. Rollo, but you have not answered the question propounded to you, and if you know, I will please get you to state whether or not there are any reverse curves within a distance of four thousand feet south of where your work train was standing at the time it was struck?

A. Have you ever been on the Ft. Deposit Hill?

Q. It is immaterial to the question that has been asked. Will you please answer my question?

A. I have told you, Mr. Clay there were curves on the hill.

Q. Yes, but you have not stated whether or not there were any reverse curves within the distance I have specified?

158 A. You state four thousand feet. I don't know what you mean about four thousand feet. You did not state in a half mile or a mile, you said four thousand feet; and I didn't measure from where the accident happened that part of the road.

Q. Then to enlighten you, I will tell you that there are 5,280 feet to the mile. Now will you state whether or not there are any reverse curves within four thousand feet?

A. Yes, sir, there are reverse curves within a mile.

Q. How many cuts, Mr. Rollo, does the track pass through within a mile south of where your train was standing when it was struck?

A. I don't know, I never counted them.

Q. Are there as many as three?

A. I don't know how many cuts on the hill. I will study.

Q. Then please study about it now and tell me if you can how many cuts the track passes through for one mile south of where your train was standing when it was struck?

A. For one mile south?

Q. Yes, sir, for one mile south.

A. There are two cuts I believe up to where my train was.

Q. Mr. Rollo, I said how many cuts for one mile south of where your train was standing when struck?

A. Two I believe to where my flagman was.

Q. Do you know where your flagman was?

A. No, sir, I don't go back to see where he was.

Q. Did you have one or two flags out south of your train on that occasion.

A. One flag.

Q. Was your train stationed at a point where it could be plainly seen by a train that was coming north?

159 A. I had a flag out on the hill which I have given you four or five times.

Q. I will ask you, Mr. Rollo, to state whether or not your train was at a point where it could be plainly seen by a train coming north on that road?

A. No, sir, if it had been stationed where it could have been seen, it wouldn't have been necessary to put out a flag. Not much use for flags on straight track.

Q. Do you think you are familiar with the rules of the company?

A. I don't know whether I am or not.

Q. Don't the rules of the company require a train when it is standing, and another train is liable to approach, even though the track is straight, to have out flags both directions for a distance?

A. I told you I had a flag out both ways to protect ourselves.

Cross-examination by Mr. Taylor, attorney for defendant:

Q. Mr. Rollo, as I understand it, when you first went out from Calhoun to the place where the wreck occurred, and where your train was at work, you sent your flagman, W. H. Taylor, on ahead with instructions?

A. Yes, sir.

Q. Then you were called in to Calhoun to let second 17 pass?

A. Yes, sir.

Q. Then you went back from Calhoun south to the point where the wreck occurred?

A. Yes, sir.

Q. Then it was at that time you sent the colored man, Clarence Hicks, out with instructions to Taylor, the flagman, to go to the overhead bridge?

A. Yes, sir.

160 Q. Then did Clarence Hicks return?

A. Yes, sir.

Q. And reported to you?

A. Yes, sir.

Q. Did he report to you the fact that he had delivered your instructions to the flagman?

A. Yes, sir.

Attorney for plaintiff objects to the above question and answer.

Q. Now then, you continued with your work, and I believe you have stated that you were on a flat car several cars back from your engine, and had gotten down from that car on the west side of the track, when you saw the engine of first 18 coming around the curve?

A. Yes, sir, I got down on the ground to see how they were unloading the cinders.

Q. When you saw it, it was at the first place it could have been seen coming around the curve?

A. Yes, sir.

Q. Did or not the engineer of your train blow the whistle after you saw first 18?

A. We were standing pretty close together, and he hopped on his engine and tried to reverse it and get out of the way, but he couldn't do anything on account of the ties and cinders, and he blew the whistle and jumped off.

Q. Was he or not standing on the ground near his engine when you first saw 18?

161 A. Yes, sir.

Q. And you say he got on his engine, and reversed his engine, and blew the whistle?

A. He didn't back his train of cars on account of the cinders and ties underneath it.

Q. Could not move the train, could he?

A. No, sir.

Q. Was there any apparent slack of the speed of first 18 from the time you saw it as it came around the curve until it struck your engine?

A. No, sir, I didn't notice any. I didn't have time to notice any.

Q. Did you hear any whistle blow on 18, either immediately before you saw it or after you saw it and before it struck your engine?

A. No, sir.

Q. When, after the collision, did you next see W. H. Taylor, your flagman?

A. After the accident happened, the supervisor and myself went around the wreck and I saw that the fireman was hurt, and I immediately got blank report 145 which we have to make out in case of accident and wreck, and I made for the telegraph office, and notified the superintendent, and when I got back to the place I saw Taylor.

Q. Where was he?

A. He was standing there at the wreck when I got back. I had to walk a mile each way.

Q. Did you ask Taylor anything about the matter, or did he make to you any statement about flagging this train?

162 A. Yes, sir.

Q. That was upon your return from the telegraph office. When you found Taylor at the scene of the wreck?

A. Yes, sir.

Q. Did he at that time state where he was when he flagged the train?

A. Yes, sir.

Q. Where did he say he was?

Plaintiff objects to the above question.

A. He said he was where he was the early part of the day, and *and* that he flagged him.

Q. Did he say why the man did not notice his flag?

Plaintiff objects to the above question.

A. He said he did not notice him when he flagged. Said he was laying with his head in the window asleep, and he tried to make somebody in the caboose hear him, but he could not make anybody hear.

Q. You did not after the wreck see the body of Mr. Holloway or see Mr. Holloway?

A. No, sir.

Q. How about the supply of torpedoes on your train, did you have a sufficient supply of them?

A. Yes, sir.

Q. How many did you have?

A. We had about a dozen, I suppose, as well as I remember we had that many.

163 Q. How many did Taylor take with him when you sent him forward?

A. He had about four or six, I think.

Q. What else did he take with him?

A. He had a red flag and four or six torpedoes, I can't say just how many.

Q. Did Taylor flag for your work train that morning?

A. Yes, sir.

Q. Was there anything unusual in his appearance?

A. No, sir, I did not notice anything.

Q. Did he appear to be alert?

A. Yes, sir, he appeared all right to me. If he hadn't I would have sent him in. He appeared all right or I would have made other arrangements.

Q. When you sent him out ahead of this work train just before you returned to Calhoun to permit 17 to pass, what was his appearance then?

A. He appeared all right, just as he had the other part of the day.

Q. How far did you see him as he went forward with the flag up the hill?

A. I saw him go pass where I was working, which is about a mile.

Q. You gave him instructions and sent him forward from Calhoun?

A. Yes, sir.

Q. And from that point, you can see down the track for a mile?

A. Yes, sir.

164 Q. Then he had gone that distance from Calhoun before you left there with your work train?

A. Yes, sir.

Q. Then you proceeded down to the place where the wreck occurred, and Taylor had then gone further up the hill?

A. Yes, sir.

Q. Was not that what you had instructed him to do?

A. Yes, sir, that was my instruction.

Q. Then the first knowledge you had of the presence of first 18 in that vicinity was when you saw it come around the curve?

A. Yes, sir.

Q. For the purpose of stopping any freight train that might have been on the track at that time coming north, how many torpedoes should have been placed on the rail?

A. To make a stop one, as a precaution 2 to stop speed and look out.

Q. One torpedo on the rail means stop?

A. Yes, sir.

Q. Do not the rules require the use of red flag in addition to the torpedoes?

A. Yes, sir.

Q. You were asked whether or not in your opinion a torpedo placed 1500 feet from your engine up the hill around the curves that may be there could have been heard by you had it exploded, taking into consideration the distance, what you were doing, and the noise, if it had exploded the torpedo would it have been possible for you to have heard it that distance?

165 A. No, sir, you could not have heard a torpedo from where my flagman was, which was about a mile, to the place to where we were working, with the number of men we had working, and the noise, too, it would have been impossible for you to have heard a torpedo. If we had been standing still and no noise, we could have heard it for some distance.

Q. Do you know whether there was much or little wind blowing that day at the time of the wreck, and from which direction it blew?

A. No, sir, I don't remember about that.

Q. Is it the purpose in placing a torpedo on the rails as a signal to have it heard by the train that is standing, or by the engineer of the train that is in motion?

A. It is to be heard by the train in motion.

Q. From whom at Calhoun did you learn of the train 18?

A. From the engineer of 17.

Q. I believe you have stated that you were in charge of this work train in place of the regular man who had charge of it?

A. Yes, sir, I went out to relieve him.

Q. Then the crew on the work train at that time was the same crew that had been with the other man in charge of the work train?

A. Yes, sir.

Q. How long at that time had you been acquainted with W. H. Taylor, the flagman?

A. I don't remember just how long, but about four or five years.

166 Q. How long was it, after second 17 went up the hill before the wreck?

A. You mean after second 17 went up the hill?

Q. Yes, sir.

A. As well as I can remember, I sent this negro, Clarence Hicks, immediately after 17 passed for further instructions to the flagman, and after he came back it was about twenty minutes as well as I remember after Clarence Hicks returned.

Q. After second 17 went south no other train of any description passed you in any direction, until first 18 approached?

A. No, sir.

Q. You have stated that W. M. Taylor came back to the caboose on that work train at McGhees about eleven or twelve o'clock on the night of the 13th?

A. Yes, sir.

Q. Was he on that work train the night of the 12th?

A. The night of the 12th was on Sunday. It was on Monday morning I went out to relieve the man on the work train, and it was about ten o'clock when I got on the job.

Q. Then you knew nothing of W. H. Taylor's connection with the work train before you took charge of it?

A. No, sir.

Q. But you had had, on the morning of the day that the wreck occurred, abundant opportunity to observe the work of W. H. Taylor, and his appearance, and you say in your opinion, in all respects, he was all right?

166 A. Yes, sir, he carried out my instructions the day before, and carried out my instructions to the letter.

Q. Was there anything in the appearance or talk of W. H. Taylor that would indicate that he was worried from the loss of sleep or otherwise, in the discharge of his duty as flagman?

A. No, sir.

Redirect examination by Mr. Clay, attorney for plaintiff:

Q. You have stated, Mr. Rollo, that Mr. Taylor had been examined by what kind of board before he was given a position?

A. I didn't say anything about a board.

Q. He passed what examination before he was permitted to flag?

A. He was examined on the standard rules.

Q. How do you know that Mr. Taylor had ever stood an examination on the standard rules for flagman?

A. He was examined just the same as I was. He stood the examination on the rules like every other man is examined.

Q. How do you know that he was examined?

A. How do I know that he was examined?

Q. Yes, how do you know it?

A. I know he would not have been with me if he hadn't been examined on the standard rules. He couldn't be a flagman.

Q. Does the Louisville & Nashville Railroad Company have standard rules that cover the operation of its trains throughout its entire system?

A. Yes, sir, I know it does on the M. & M. Division.

168 STATE OF ALABAMA,
Montgomery County, set:

I, Ida Lewis, a Notary Public in and for said County, in said State, commissioned by agreement of the parties, which is hereto attached, certify that the foregoing depositions of Samuel F. Arn and W. F. Butts, were taken before me at my office, No. 40 Vandiver Building, in the City and County of Montgomery, State of Alabama, on the 29th day of March, 1913; and that the depositions of W. D. Reynolds and J. N. Rollo were taken on March 31st, 1913, at the same place and for the purpose mentioned in the caption; and also further examination of Samuel F. Arn was taken on March 31st, 1913; that all of said witnesses were duly sworn before giving their deposition to tell the truth, the whole truth, and nothing but the truth; that said depositions were written by me in short-hand, by agreement of the parties, in the presence of the witnesses, and the signature of the witnesses were waived by both parties.

The plaintiff was represented by attorney A. Y. Clay, and the Defendant was represented by Attorney N. P. Taylor. Given under my hand and seal this 3rd day of April, 1913.

IDA LEWIS,
*Commissioner and Notary Public,
Montgomery County, State of Alabama.*

My commission expires June 8th, 1913.

The amount of my bill for services rendered in the above matter, amounting to \$43.75, has been paid by Messrs. Clay & Clay, attorneys for plaintiff.

[SEAL.]

IDA LEWIS.

169 Said agreement attached to deposition is here copied:

We, the undersigned, hereby commission Ida Lewis, a Notary Public in and for the City of Montgomery, County of Montgomery, State of Alabama, to take the depositions of W. F. Butts, W. D. Reynolds, J. N. Rollo, Howard McKensie, Samuel F. Arn and W. T. Seible, at her office in the Vandiver Building in said City and County aforesaid, to be read as evidence on behalf of plaintiff on the trial of the case of E. S. Holloway, Administrator, &c., against Louisville & Nashville Railroad, now pending in the Henderson Circuit Court, State of Kentucky with full power to issue process for attendance of said witnesses at the times and place mentioned for taking the depositions.

Witness our hands this 25th day of March, 1913.

CLAY & CLAY,
Attorneys for Plaintiff.

N. P. TAYLOR &
JOHN C. WORSHAM,
Attorneys for Defendant.

The defendant then introduced those witnesses who testified orally on its behalf as shown by the said stenographer's Transcript of Evidence, and at the conclusion of their said testimony the defendant read the depositions of R. C. Gorey, Sr., W. H. Taylor, Jr., R. C. Gorey, Jr., J. E. Lockhart, A. E. Parker, and Samuel F. Arn, which are as follows:

(The Clerk will here copy the foregoing depositions.)

170 *Deposition of R. C. Gorey, Sr.*

A. Y. Clay, Attorney for Plaintiff.
N. P. Taylor, Attorney for Defendant.

Deposition — R. C. GOREY, Sr., taken at the office of Miss Effie Turnipseed in the City and County of Montgomery, State of Alabama, on the 21st day of May, 1913, pursuant to the notice attached to be read as evidence on behalf of the defendant on the trial of the case now pending in the Henderson Circuit Court wherein E. S. Holloway, Administrator, Etc., is plaintiff and the Louisville & Nashville Railroad Company is defendant.

Direct examination by N. P. Taylor, attorney for defendant:

Q. Please state your name, age, residence and occupation?

A. R. C. Gorey, Sr., age 51 years, residence Montgomery Ala., Assistant Master of Mechanics for Louisville & Nashville Railroad.

Q. What experience Mr. Gorey, have you had as an engineer in charge of trains?

A. I was fireman and engineer and supernumerary fireman and back to running an engine at various times up to 1892, since that time I have been foreman and general foreman and assistant master of mechanics.

Q. For how many years were you an engineer?

A. I suppos not over two years all told. Twa years of solid time as an engineer.

Q. Ever since that time has not your business and employment been connected with engines?

171 A. Yes, all of that time except four or five months I was assigned to the car department wholly. Five or six months of that time I had nothing to do with the locomotive department in the year 1907.

Q. I will ask you Mr. Gorey to state from your experience and knowledge of engines and their operation how an engine should be stopped in an emergency?

A. If you are rolling along or traveling without working steam the only thing necessary to do to stop an engine is to open the sand door, drop sand on the rail and then apply the air brake; but if you are working steam at the time you desire to stop it will be necessary to close the throttle, open the sand door and apply the air brake.

Q. Then as I understand you, in the case of an engine and train of cars on a down grade then you would not use steam at all in case of an emergency and when it was desired to stop the train in the least possible distance the first duty of the engineer is to apply the sand and then apply and set the brakes?

A. Yes, sir.

Q. Would it be desired under those conditions to reverse the engine?

A. No, sir, it would not be desired.

Q. How long should it take to apply the sand and set the brakes?

A. About two-thirds of a second.

Q. To do both?

A. Yes, sir.

172 Q. When the sand is applied and the brakes set is there anything left for the engineer to do towards stopping his train?

A. No, sir, there is nothing more he can do to help stop his train after he opens the sand door and applies the air brakes.

Q. Assuming that the engineer at the time he discovers the danger to his train and after he has applied the sand and set the brakes, is seated on the right-hand side of his engine, how long would it take him to escape from the engine?

A. If the engine was in motion and oscillating considerable on a curve it would take from four to six seconds for him to stand here and drop his seat, walk back to the gang way between the engine and tender, step down on the step and jump off.

Q. If the train should be going down grade at some thirty-five or forty miles an hour do you think the time necessary to get off the engine would not exceed at any rate six seconds?

A. No, sir, it would not.

Q. Is there any other means of escape for the engineer except to go down to the gang way and jump from the steps of the engine?

A. The only other means of escape is to get out through the cab window without going back to the gang way, which is sometimes done by engineers who want to get off in a hurry, but when a man

has plenty of time he walks back to the gang way so as to get down on the step as close to the ground to keep from falling off when he steps off.

Q. Did you ever at any time, Mr. Gorey, make a test of the length of time necessary to apply the sand, set the brakes and get off the engine?

173 A. Yes, sir, I have made tests of the time to see how long it would take.

Q. Was the train in motion on which you made the tests?

A. No sir, not the last time I made the test, she was standing still.

Q. Did you make allowance in making this test for the difference in time that might be occasioned by the speed and oscillating of trains?

A. Yes, I made the allowance.

Q. What length of time did it take?

A. Six seconds.

Q. What size man are you as to height and weight, Mr. Gorey?

A. Six feet and a half inch tall and weigh 225 pounds.

Q. Would it not take a man of your size a longer time to get up and lift his seat and go get to the gang way than a man weighing say 160 pounds?

A. Yes, sir, it would take a man of my size longer than it would a smaller man on that particular type of engine that I made the test on.

Q. Is not the engine on which you made the test the same type of engine on which Mr. Holloway was at the time of the wrecking of First Eighteen?

A. Yes, sir, exactly the same type of engine.

Q. Mr. Gorey, in case of the collision of an engine and a train containing twenty-three or four cars is or not there two shocks, the first shock a slight shock and the main shock of the collision following say some two or three seconds later?

174 A. That depends on what part of the train you have reference to.

Q. Say a man would be on the rear end of a train containing twenty-three or four cars, would he not feel first a slight shock and then two seconds perhaps later the main shock of the collision?

A. Yes, the first shock is felt when the engine collides with the other engine, you feel that the entire length of the train. Then the train breaks up at the point of collision immediately behind the engine and gives way to the following cars and when the cars following the ones that pile up in front is fully stopped the second shock occurs, which is usually the most severe of the two shocks for the reason that the cars that break up in wreck giving way to the head end of the train lets the slack run out of it just as the break here occurs. When the slack runs into the pile of wreckage and is stopped without any further breaking up of the cars the second shock is usually the heaviest of the two.

Q. What interval of time in such a train as that described would there be between the first and second shock?

A. That would depend upon the speed of the train and the number of cars that broke up or crushed up that gave way to the impact of the following cars.

175 Q. It would all depend on the speed of the train and the length or number of cars of the train that crushed up?

A. Yes, I guess it would run anywhere from a small fraction of a second up to about two seconds in a twenty-five or thirty car train. That is a thing I have never made a test of. I only have to estimate that on the speed of the train and slack that would occur to the impact of the rear part of the train and the recoil that would occur when the train fully stopped.

Q. Is there not several inches of slack between the coupling of the cars of the train and would not the second shock be occasioned in proportion by the taking up of this slack?

A. There is anywhere from four to seven inches of slack between each two cars, depends on whether the train is traveling or whether it is being pulled. When you pull a train you compress the springs and pull the cars from apart and of course when the slack runs in there is no more slack to run in than if the cars were just traveling and following each other without the spring being compressed. When they are traveling there is about four inches of slack in them. If pulling a heavy load there is about seven inches.

Q. When the brakes are applied and set in emergency, Mr. Corey doesn't the setting of the brakes cause a sudden stoppage of the train and would not the shock so caused be noticeable to a person standing on the pilot of the engine?

176 A. When the air brake is applied of course it immediately reduces the momentum of the train and the tendency is for a man to swing forward or fall forward unless he has a hold of something. When you feel it that way it is very perceptible. You feel it on the engine any time the brake is applied. For instance, the fireman working in the gang way, and the brakes are applied, if he has a shovel full of coal unless he is braced he will fall against the pilot head. For that reason the fireman usually braces himself.

Q. Would not the application of the brakes in an emergency cause a shock to any one in that part of the train that would be easily perceptible?

A. Yes sir, it is very easily perceptible on any part of the train and more perceptible on the rear part of the train than it is on the heavy engine in the front.

Q. When the brakes are applied in emergency do they not immediately and instantly check the train?

A. Yes, instantly, or a mere part of a fraction of a second from the time the brake handle is swung into position until the brakes is applied; we say it instantly takes effect.

Q. How far does the brake handle have to be moved in order to apply and set the brakes?

A. The brake handle is about seven and one-half inches long, and it travels about one-fifth of a circle. It travels a radius of $7\frac{1}{2}$ inches

about one-fifth of a circle. The outer end of the handle
177 would move nine inches, the length of a turn on a pivot.
The outer end moves about nine inches.

Q. At what distance would the lever that opens the door that applies the same have to be moved?

A. Within a radius of about two and one-quarter inches and that would just be a short turn of the hand.

Q. As soon as the brakes are set and the sand applied would not the engine immediately begin to slacken speed?

A. Yes sir, immediately, instantly you might say.

Cross-examination:

Q. Mr. Gorey, when were these tests you speak of made and where?

A. They were made this year. I think it was in the month of April, at the shop here in Montgomery; in the shop yard, not in the shop.

Q. In making these tests did you instruct the engineer to see how rapid he could manipulate the levers?

A. No sir, I was the one who made the tests, myself. I did not have the engineer make the tests. I got on the engine myself and made all the moves necessary to apply the brakes and get off.

Q. Then in making the test you knew from the time you started that you were making the test and were *from the time you started that you were making the test and were* not delayed any time in making them?

A. Yes sir, I was making the test, went up on the engine
178 for that purpose and was not delayed by anything other than the losing of time that was made for any false move that might be incident to the oscillating of an engine that was running at high speed. I call the gentleman's attention to the fact that a man would not be able to make as perfect a move when the engine was at high rate of speed and oscillating that he might be able to make when the engine was standing and for that reason a double move or two moves is usually necessary to apply the brakes and get off, including the dropping of the seat out of my way to go back to the gang way. I called the gentleman's attention to that fact.

Q. At the time of making the test you were calm and cool and not confronted by any apparent danger?

A. Yes sir.

Q. Can a man under stress of excitement manipulate the levers of an engine under stress of excitement as quickly as you would knowing that you were going to make tests?

A. Yes, I was always able to do so.

Q. Can you state whether or not all men are so fortunate?

A. No sir, I do not believe I am able to state that. In my opinion all men do not act alike under excitement and I do not know whether all men would make a reach for the sand and air brake as coolly and collectively as I have already done.

179 Q. But in your calculation you made no allowance for any excitement?

A. Yes, I made allowance for all of that in the false move a man might make under those circumstances. The moves you understand are just a move of the hand; two slight moves of the hand like that (indicating by hand). That is all that is necessary to do to apply the brake. After the brake is applied the only thing left for an engineer to do is to get off safely. He cannot do any more good by remaining on the engine.

Q. Assuming that the man was sitting it would be necessary for him to stand up and drop his seat out of his way, which is done on the left hand side, throw the brake and then walk back to the gang way between the engine and tank and in doing that to make two or three reaches for the grab iron to get a hold of two step down on the step and reach his foot for the ground?

A. I called the gentleman's attention to the fact that it might be necessary to do that when the engine was running at high rate of speed and oscillating. Under excitement a man might not be able to act as quickly and coolly as I did when the engine was standing at rest and in no apparent danger.

Q. Did you know Mr. John Holloway?

A. Yes, sir.

180 Q. Did you consider him a capable engineer?

A. Yes, I considered him capable.

Q. But you would not say how long it would take Mr. Holloway to have applied those brakes in the state of mind he was when he discovered that there was a work train in front of him?

A. No, sir, I am not able to state that. I was pretty well acquainted with Mr. Holloway and he worked under my supervision for twelve or thirteen months. I never met him under any great stress of excitement and do not know whether he would be cool and collected or whether he would lose his head. I don't know what expression to use other than that.

Q. An engineer driving an engine usually sits in what position, Mr. Gorey, if you know?

A. He sits with his right side to the side of the cab and his left side to the boiler facing the forward end of his engine.

Q. His hand upon what part of the machinery, if any?

A. The majority of engineers have a habit of hanging their hand on the end of the throttle lever, the throttle lever is a little higher than the shoulder. With their right elbow on the arm rest in the cab window.

181 Q. Do you know whether First Eighteen, the train on which Mr. Holloway was engineer, was traveling down hill or at steam?

A. No sir, I do not know whether it was driving or working steam.

Q. Please state whether or not a man upon the rear end of a train could tell the difference in the shock caused by a collision and the shock caused by the application of the brakes?

A. I do not know whether I am very well competent to state that for the reason that I have been in only one collision since the adoption of the automatic coupler and when we had the Lincoln pin coupler there was much more slack in the train and we could tell

at that time. (I have heard men say they cannot tell whether it is an application of the brake from the engine or whether they have struck an obstruction unless they can see from the engine.)

Objection by Plaintiff. Sustained. Exception.

Q. Mr. Corey, I will ask you when a train is traveling and the slack is taken up between the cars whether there are two shocks caused by a collision or just the one?

A. There are two. There are two shocks regardless of whether the train is traveling or being pulled with steam. The first shock when the train is traveling or rolling is not as intense a shock as it would be if you were pulling a train and had the slack stretched out. I mean the shock would not be as intense at the rear end, of course the shock would be the same at the head end, either driving or pulling for the reason that there would not be as much slack run in if the train was driving as there would if the train was being pulled. When the train brakes up or crushes up it gives a relief to the impact in the rear end of the train and as soon as the wreckage piles up and the impact from the rear of the train is finally stopped it is stopped by an obstruction. The two shocks coming near together, the train being stopped for the obstruction and the recoil of the springs it is apparently one shock.

Q. Mr. Corey, in giving this evidence you speak from your knowledge as a mechanic and not from actual experience?

A. I am speaking from experience.

Q. From actual experience of being in collision?

A. Yes, in collision. I have only been in one collision since we applied the automatic coupler but during my experience braking and other capacities on the road I was in more than one collision. I have had a great deal of experience in collisions and wrecks and running into obstructions such as falling rock in tunnels, big boulders coming down in tunnels.

Q. Did you know Mr. Holloway's earning capacity per month when he was with the M. & M. division?

183 A. I had it figured in the office for twelve months prior to his death and for those twelve months it was \$156 and some odd cents per month. Cannot state exactly the number of cents, but I do know it was \$156.00.

Deposition of W. H. Taylor.

Deposition of W. H. TAYLOR, Jr., taken at the same time and place and for the same purpose as stated in the caption.

Direct examination by N. P. Taylor:

Q. Please state your name, age, residence and occupation?

A. W. H. Taylor, Jr., age twenty-four; 50 S. Goldthwaithe St., Montgomery, Ala., occupation automobile business.

Q. Mr. Taylor, by whom were you employed on the 14th day of May 1912?

A. By the L. & N. Railroad.

Q. In what capacity?

A. Braking.

Q. For what length of time had you been serving the L. & N. Railroad Company in the capacity of flagging?

A. About three months.

Q. Before that time had you been in the employ of that company?

A. I had.

Q. When and for what length of time?

A. I do not know exactly but about two years.

184 Q. Did you mean two years before that time you had been in their employ?

A. Yes sir.

Q. For what length of time did you continue in their employment during your first employment?

A. About eighteen months or two years.

Q. You were acting as flagman during that time?

A. Yes sir.

Q. During your first employment on what part of the L. & N. Railroad were you employed?

A. M. & M. Division.

Q. On May 14, 1912, with what crew or train were you working?

A. On a work train, Powell's crew.

Q. Was conductor Powell in charge of the work train?

A. Yes sir.

Q. Who was in actual charge of the work train on the day you were employed on May 14, 1912?

A. Rollo.

Q. He had taken the place on that occasion of the regular conductor?

A. Yes sir.

Q. For what length of time had you been working with this particular work train?

A. To the best of my recollection, about two weeks.

Q. Where was this work train stationed on the night before the day of May 14, 1912?

A. At McGehees.

Q. How far is McGehees from Montgomery?

A. Nine miles.

Q. Did you stay with the work train at McGehees that night before May 14?

A. Yes sir.

Q. If you left the work train while it was stationed at McGehees on that night state where you went and at what hour you returned to McGehees?

A. I left McGehees about seven o'clock and returned about 11:30 or 12.

Q. Where did you go that night?

A. To Montgomery.

Q. How did you go in?

A. On 72, I think was the number of the train.

Q. How did you return?

A. On number 20, I think. Am not positive as to the train number.

Q. Was any one with you on your return to the work train at McGehees?

A. Mr. Darbey.

Q. And you think you reached McGehees on your return about 11:30?

186 A. It was 11:30 or 12, was not after 12.

Q. Did you retire immediately on your return to McGehees?

A. I did.

Q. At what hour did you get up the next morning?

A. Six o'clock.

Q. At what hour did you go to work the next morning?

A. About seven or a little after.

Q. Where did the work train go the next morning?

A. Went to Tyson. The work train worked between Tyson and McGehees.

Q. Were you the next morning flagging for that work train?

A. Yes sir.

Q. Between what stations?

A. McGehees and Tyson.

Q. When after that did the work train go between Ft. Deposit and Calhoun?

A. Some time between nine and ten o'clock.

Q. In the morning of May 14, 1912, was the work train working at the same point that they were in the afternoon of that day?

A. No sir, they worked in the afternoon between Calhoun and Ft. Deposit and in the morning between McGehees and Tyson.

Q. At what hour did they begin working between Calhoun and Ft. Deposit?

187 A. About ten o'clock.

Q. Then after ten o'clock and in the morning of that day they were working between Calhoun and Ft. Deposit at the same point they were stationed in the afternoon?

A. Yes sir.

Q. Were you flagging for that work train on what is known as Ft. Deposit hill during the morning?

A. Yes sir.

Q. At what hour did you come in and to what station did you go for dinner?

A. Some where in the neighborhood of 11:30. Went into Calhoun.

Q. When did you get out of Calhoun after you had had dinner?

A. Something after twelve, between twelve and one, do not know the exact time.

Q. At that time was the work train in Calhoun?

A. Yes sir.

Q. Did you or not go out in front of the train there?

A. Yes sir.

Q. How did you go?

A. Walked.

Q. Under whose instructions did you go?

A. Conductor Rollo.

188 Q. To what point did he tell you to go?

Objected to by Mr. Clay.

A. To the twenty-nine mile post.

Q. Mr. Taylor just go ahead and tell where, when you left Calhoun between twelve and one o'clock, where you went?

A. I went just about fifty feet north of the twenty-nine mile post.

Q. To what point?

A. To an embankment under a tree.

Q. On which side of the road was this tree?

A. On the left-hand side going north.

Q. How near to the track?

A. Fifteen or twenty feet.

Q. While you were stationed there under this tree what train first passed?

A. Double header seventeen going South.

Q. Do you know who the engineer of that train was?

A. Sam Ann was on the first engine. I have forgotten who was on the second engine.

Q. Did you give any signal to the first engine?

A. No sir.

Q. Did you give any signal to the engineer of the second engine?

A. I spoke to him. Asked him where he met the other train.

Q. Did you give any other signal?

A. No sir.

189 Q. At what speed was this train going?

A. Going very slow, not more than ten miles an hour.

Q. This train was going South and up the grade of Ft. Deposit hill?

A. Yes sir.

Q. How long had you been under the tree at that point when First Seventeen went South?

A. Not more than thirty minutes.

Q. After that time what was the next train that passed you?

A. First Eighteen coming north.

Q. First Eighteen was the train on which Mr. Holloway was engineer and it was wrecked?

A. Yes sir.

Q. How long was it after First Seventeen the double header you have just mentioned passed you going South before First Eighteen came north?

A. About twenty-five minutes.

Q. How long did you remain under the tree after First Seventeen passed?

A. About five minutes.

Q. Where did you go then.

A. Went to the cattleguard south of the twenty-nine mile post.

Q. Before First Seventeen passed you did any one come from the work train with any message for you, if so, who?

190 A. Clarence Hix.

Q. From whom did he bring you a message?

A. Conductor Rollo.

Q. You say you remained there about five minutes after First Seventeen passed and then went to the cattle guard?

A. Yes sir.

Q. About what distance is it from the tree to the cattle guard?

A. I don't know, about one hundred yards.

Q. The cattle guard is south of the tree where you were first stationed?

A. Yes sir.

Q. How long did you remain at the cattle guard before you first saw First Eighteen going north?

A. About twenty minutes.

Q. Whereabouts at the cattle guard were you stationed when you first saw First Eighteen?

A. Seated on the cattle guard.

Q. Now tell the examiner just what you did when you saw First Eighteen approach?

A. I was flagging but got no response. I hollered at him as he passed.

191 Q. At that point for what distance can you see the approach of a train going north?

A. A thousand or fifteen hundred feet.

Q. You say you first used the flag?

A. Yes sir.

Q. Did the train slow up?

A. No sir.

Q. On which side of the track going north were you when First Eighteen passed you at the cattle guard?

A. On the right hand side.

Q. How far from the track?

A. Right on the track. Not more than three feet off of it.

Q. You were just off the track on the right hand side of the track going north?

A. Yes sir.

Q. Did you see the engineer of First Eighteen as the train passed you?

A. Yes sir.

Q. Describe his position?

A. Saw his arm and could see the top of his hat where he was looking down in the engine cab.

Q. Where was he stationed on the engine?

A. On the right hand side.

192 Q. He was in the seat usually occupied by the engineer?

A. I suppose so.

Q. You then saw what you did see of the engineer through the window of the cab?

A. Yes sir.

Q. What kind of hat did he have on?

A. Black hat, felt.

Q. Did you see his face?

A. No sir.

Q. You cannot say from what you saw of him just what he was then engaged in doing?

A. No sir.

Q. Did you see any one else on or about the engine?

A. No sir.

Q. As the train passed you what effort did you make to attract the attention of any one on it?

A. I *hollered* at the caboose.

Q. Did you see any one on or about the caboose?

A. No sir.

Q. Then the only person, as I understand you, that you saw on the train anywhere was the arm and hat of the engineer?

A. Yes sir.

Q. When you left the tree after First Seventeen went South did you place any torpedoes on the track anywhere?

193 A. Yes sir.

Q. State where?

A. Placed one just about the tree, near the cattle guard.

Q. You mean the torpedo was placed between the tree and the cattle guard?

A. Yes sir.

Q. At what distance were you from the cattle guard?

A. About fifty or seventy yards, I reckon.

Q. Immediately after leaving the cattle guard going north is there not a short cut?

A. Yes sir.

Q. How near to the north end of this cut did you place the torpedo?

A. Right at the north end.

Q. When first Eighteen passed you at the cattle guard did you hear the explosion of this torpedo?

A. No sir.

Q. Do you think from the location of it, considering the noise of the train as it passed that it would have been possible for you to have heard this explosion?

A. Cannot say positively. I was excited at the time and not paying any attention to it.

Q. But you did not hear it?

A. No sir.

194 Q. When First Eighteen passed you without stopping what did you then do?

A. I started down there and turned around and flagged Second Eighteen.

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Q. How far did you go north after First Eighteen passed before returning to the cattle guard?

A. Not more than twenty or thirty feet.

Q. Then you immediately returned to the cattle guard?

A. Yes sir.

Q. What was the next train going north that passed you?

A. None.

Q. What was the next train that approached?

A. Second eighteen.

Q. How long was it after first Eighteen passed before second eighteen reached the cattle guard?

A. Not more than three or four minutes.

Q. How did you stop that?

A. Flagged him.

Q. Who was the engineer on Second Eighteen?

A. Parker.

Q. That train stopped at the cattle guard?

A. Yes sir.

Q. What did you then do?

A. I got on the engine.

Q. Where did the train go?

A. Slowed up and went down and stopped right behind
195 First Eighteen where she was wrecked.

Q. Who else was on the engine of Second Eighteen when you got on?

A. The fireman and brakeman.

Q. Who were they?

A. I do not know.

Q. Then when Second Eighteen went down the track to the scene of the wreck what did you do?

A. I got off and walked down to the wreck.

Q. Then the first person that you saw after First Eighteen passed you at the cattle guard was engineer Parker; on Second Eighteen?

A. Yes sir.

Q. Did you see McKenzie, the flagman of First Eighteen?

A. Yes sir.

Q. Where did you see him?

A. He was going back when I got on Second Eighteen.

Q. Did he get on Second Eighteen?

A. Yes sir.

Q. Now then when you went down to the scene of the wreck on Second Eighteen and got off did you go down further towards where the work train stood?

A. Yes sir.

196 Q. Who did you see down there as soon as you arrived?

A. I saw several. I do not remember who they were.

Q. Did Parker and McKenzie or any one else from the engine of second Eighteen go down as you did?

A. I cannot say they did.

Q. After First Seventeen passed you while you were stationed

under the tree did you hear any trains whistle in the direction of Fort Deposit?

A. Yes sir.

Q. Did you get from either of the conductors on First Seventeen, the double header, any information as to where that train would meet other trains goin north?

A. Not from the conductor, no.

Q. Did you get such information from any one on that train?

A. Engineer on second engine, yes.

Q. What was that information?

Question objected to by Mr. Clay.

A. I asked him whether he met Eighteen and he pointed up the hill.

Q. Was that before or after you heard the train whistle in the direction of Fort Deposit?

A. Before.

197 Q. What did you do, Mr. Taylor, while you were stationed under the tree from the time you reached there until you left there to go to the cattle guard?

A. I do not know. I was whittling on the flag staff for one thing.

Q. Were you standing up or sitting down?

A. Part of the time was standing up and part sitting down.

Q. After First Eighteen passed did you see anything of McKenzie the flagman, on that train before Second Eighteen stopped at the cattle guard?

A. Yes, I saw him just about the same time I saw second Eighteen come around the curve.

Q. He was coming towards you from the direction of the scene of the wreck?

A. Yes, sir.

Q. Did you hear the collision which occasioned the wreck?

A. Yes, sir.

Q. Was it after you had heard the collision that you saw McKenzie the flagman, from First Eighteen approach?

A. Yes, sir.

Q. How many torpedoes did you have with you that trip?

A. Four, I think.

Q. Did that include the one you placed on the rail between the tree and the cattle guard?

198 A. Yes, sir.

Q. What did one torpedo indicate to the engineer?

A. To stop.

Q. Does it mean he should stop immediately?

A. Yes, sir.

Q. What did two torpedoes indicate?

A. Caution, signal.

Cross-examination by Mr. Clay:

Q. Mr. Taylor, how long have you been in the automobile business?

A. About two months.

Q. Here in the city of Montgomery?

A. Yes, sir.

Q. Immediately before that what business were you engaged in and where were you located?

A. Not engaged in any.

Q. Where were you located?

A. I was here, in jail.

Objection interposed by Mr. Taylor.

Q. How long had you been in the county jail?

Objection. Sustained. Exception.

A. About eight months.

Q. How long after this wreck occurred between Fort Deposit and Calhoun before you ceased working for the Louisville & Nashville Railroad Co.?

199 Objection. Sustained. Exception.

A. About one week.

Q. Did you stop of your own accord or was discharged?

Objection interposed by Mr. Taylor.

A. Stopped of my own accord.

Question withdrawn.

Q. How long do you say you had been working for the company this last time?

A. About three months.

Q. In what capacity?

A. Brakeman, flagging, the same thing.

Q. Before that you had worked for the company eighteen months or two years?

A. Yes, sir.

Q. What interval passed between those two employments?

A. About a year, I suppose.

Q. Are you familiar with the rules of the Louisville and Nashville Railroad Company?

A. Yes, sir.

Q. When the work train occupies the main track what would be required to be done?

A. To place flags both at the north and south end of the work train.

Q. What is necessary for the flagman to do, or the brakeman when he is acting in the same capacity approaching the front end
200 of a train?

A. Put down one torpedo 1,500 feet from where they are working. Put down two about 3,000 feet or 2,500 feet.

Q. Was this done upon this occasion?

A. No, sir.

Q. Why?

A. I did not have the torpedoes.

Q. Why didn't you get the torpedoes?

A. There were only eight of them on the cab. I carried four of them and left four.

Q. Did you know how many torpedoes were on the cab when you started out?

A. Yes, sir.

Q. How long had you known?

A. Since the evening before.

Q. Did you tell any one in charge of the train whose duty it was to furnish those torpedoes there was not a sufficient number?

A. I told Conductor Rollo and flagman Darbey.

Q. You say you started out with four torpedoes on this occasion.

A. Yes, sir.

201 Q. How far south of this cattle guard is the first over head bridge, if you know?

A. About 2,500 or 3,000 yards.

Q. You say you went to Montgomery the night before this wreck from McGehees?

A. I did.

Q. And went to Fort Deposit hill upon the evening this wreck occurred?

A. Yes, sir.

Q. Who did you go to Montgomery with?

A. Flagman Darbey.

Q. Are you certain of the train you returned on?

A. Certain as to the train.

Q. The number of the train.

A. No, sir.

Q. Do you know who the conductor or any of the crew on the train were?

A. I do not remember who they were.

Q. You do not know who any of the crew were on the train that you returned to McGehees on?

A. No, sir.

Q. Where did you ride on the train when you returned?

A. I have forgotten whether I rode on the engine or on the cab. I came in that way several times. Some times I rode one

202 place and then another.

Q. But you have no recollection and cannot state or give the names of any one that was on the train you returned to McGehees the night before this wreck occurred?

A. No, sir.

Q. Was it before or after you returned from Montgomery that you advised the conductor and flagman that there were not sufficient torpedoes on the train?

A. Told the conductor before and the flagman afterwards.

Q. How many torpedoes were used by you before First Eighteen passed?

A. One.

Q. That made you have three torpedoes left?

A. Yes, sir.

Q. Was that a sufficient number to comply with the rules in flagging First Eighteen?

A. Yes, sir.

Q. Then why didn't you do it?

A. *They* appeared to be another train behind and had to stop it.

Q. When Clarence Hix came from the work train with a message to you did you send by him a message to the conductor?

A. No, sir.

203 Q. What is the nature of the track at the cattle guard?

A. Straight.

Q. Straight for what distance?

A. A thousand feet.

Q. Could you see the over head bridge from the cattle guard?

A. No sir.

Q. Could you see the work train from the cattle guard?

A. No sir.

Q. What position were you in when First Seventeen passed?

A. I was sitting down.

Q. Is it not a fact that you were reclining under the tree when First Seventeen went up the hill?

A. I might have been on my elbow sitting down, I do not remember just how I was.

Q. And five minutes after Seventeen passed you went to the cattle guard?

A. About that time.

Q. And remained there until Eighteen came in sight.

A. Yes sir.

Q. Why did you move from that position?

A. I thought better to go up that far.

Q. You moved then of your own volition and not under instructions?

A. Under instructions too.

204 Q. Who did you see on First Eighteen?

A. Did not see anybody.

Q. Didn't see a soul on First Eighteen?

A. No sir.

Q. Didn't you say just now you saw the hat and arm of the engineer?

A. I do not know it was, I saw a hat and arm.

Q. How long, Mr. Taylor, had number Seventeen passed before number eighteen came in sight?

A. About twenty-five minutes?

Q. Did Clarence Hix come up to see you after number seventeen passed?

A. Before number seventeen passed.

Q. How many torpedoes had you placed on the track before seventeen passed?

A. One.

Q. Where was that placed?

A. North of where I was sitting; north of Twenty-nine mile post.

Q. After number seventeen then burst two torpedoes as it was going south you had not long placed the other one on the track?

A. No sir.

205 Q. About how far north of the twenty-nine mile post was it that you placed the torpedo that was bursted by number Seventeen?

A. About fifty yards.

Q. How long had Hix been up to where you were near the Twenty-nine mile post before number seventeen passed?

A. About ten minutes.

Q. Where were you when he came up?

A. Sitting under a tree on the side of the track.

Q. You remained at the same place until Seventeen passed?

A. Yes sir.

Q. Did you know from Hix that number seventeen was coming?

A. I heard number seventeen coming.

Q. How long did you remain near mile post twenty-nine under the tree after number seventeen passed?

A. About five minutes.

Q. And then went down near the cattle guard?

A. Went down to the cattle guard.

Q. You were at the cattle guard when number First Eighteen came in sight?

A. Yes sir.

Q. For what distance could you see number Eighteen?

A. One thousand or fifteen hundred feet.

Q. Good straight track there?

206 A. Yes sir.

Q. Were you sitting or standing when number eighteen came in sight?

A. Was up on the cattle guard sitting there.

Q. Just as soon as number Eighteen came in sight did you get down from the cattle guard?

A. I did.

Q. And got in what position?

A. In a standing position down on the track?

Q. Did you unfurl your flag?

A. I did.

Q. Just as soon as eighteen came in sight?

A. Before it came in sight, I heard her.

Q. What signal did you give him?

A. Swung my flag across the track.

Q. What distance was he from you when you gave him the signal?

A. About fifteen hundred feet.

Q. Was there any answered signal from the engineer?

A. No sir.

Q. Is it not customary for the engineer to answer a signal?

A. Yes sir.

Q. Did you see any one on the engine at all?

A. No other than the engineer.

207 Q. You did not see any one in the fireman's seat?

A. No sir.

Q. Did not see any one on the cow-catcher of the engine?

A. No sir.

Q. What effort did you make to attract attention of the men on the train?

A. I holloaed.

Q. Holloaed, when the engine passed?

A. Yes sir, and when the caboose passed.

Q. As the engine passed did you see anybody in the cab beside the engineer?

A. No sir.

Q. Did you see any one at all on the train any place besides the engineer?

A. No sir.

Q. When the engineer failed to respond to your signal what did you do, did you continue to waive your flag before he got to you?

A. Yes sir.

Q. You say you holloaed as the engine passed trying to attract attention of some one in the cab?

A. Yes sir.

Q. And also holloaed as the caboose passed trying to attract the attention of some one there?

A. Yes sir.

Q. Where did you place the torpedo on the track before number Eighteen came along?

208 A. About fifty feet north of where I was standing at the cattle guard.

Q. Fifty feet north of the cattle guard and then went back to the cattle guard to flag the train?

A. Yes sir.

Q. Did that torpedo explode?

A. Could not tell you whether it did or not.

Q. You could easily hear the torpedo for fifty feet, could you not?

A. That was in a cut and the noise of the train, and I was excited at the time and did not pay any attention to it whether it exploded or not.

Q. You was excited before the train got to you, fifty feet before the train got to you?

A. He had not answered my signal, yes.

Q. You were excited before it got to the place where the torpedo was placed?

A. Yes he was by me when he hit the torpedo.

Q. He had already passed?

A. Yes sir.

Q. After the train passed what did you do, Mr. Taylor?

A. Started to go down where he was, turned back to flag second Eighteen.

209 Q. You started down towards the place of the collision?

A. Yes, sir.

Q. And then what did you do?

Q. Thought of second Eighteen; saw signals on First eighteen and I turned back and flagged Second Eighteen.

Q. Did you place any torpedoes on the track for Second Eighteen?

A. Yes sir.

Q. Where was that one placed?

A. The same place as the first.

Q. About fifty feet north of the cattle guard?

A. Yes sir.

Q. Then you went back to the cattle guard to flag second eighteen?

A. Yes sir.

Q. How long before second eighteen came in sight?

A. Two or three minutes.

Q. Did you sit or stand?

A. Stood.

Q. Were you standing still when first Eighteen came in sight or going back to flag Second Eighteen?

A. Going back towards it.

Q. Had you passed the cattle guard when second eighteen came in sight?

A. No sir.

Q. Whereabouts were you with reference to the cattle guard when 2nd 18 came in sight?

A. Not more than ten feet north.

210 Q. You were not then standing on the side of the road whistling your flag-staff when First Eighteen came in sight?

A. Wouldn't say I was not. Do not remember.

Q. You were excited at the time?

A. Yes sir.

Q. When Second Eighteen came up to where you were, did you say anything to the engineer?

A. I disremember what I said, but I told him First Eighteen had gone into the work train, to the best of my knowledge.

Q. Did you know at that time that Eighteen had gone into the work train?

A. Yes sir.

Q. How did you know it?

A. I heard the collision, heard the steam and saw the telegraph wires pull together.

Q. Saw the telegraph wires up together?

A. Yes sir.

Q. Is it not a fact that the only thing that you told the engineer of Second Eighteen was that the work train was below?

A. No sir.

211 Q. It is not a fact, you are positive of that?

A. I am positive. I did not tell him the work train was there, told him something about First Eighteen.

Q. How far, if at all, did Second Eighteen run pass you before it stopped?

A. About ten feet, fifteen may be.

Q. What did you do then?

A. Run up and caught the engine.

Q. At what point was it that you and McKenzie, flagman from First Eighteen caught second Eighteen?

A. About the same place, don't remember exactly where I got on.

Q. Number Second Eighteen then had stopped and was going

down towards the place where the collision took place when McKenzie came in sight?

A. No, McKenzie came in sight before Second Eighteen stopped, or about the same time.

Q. How did you go down to the place where the accident happened?

A. On engine of Second Eighteen.

Q. Whereabouts on the engine?

212 A. I disremember what part of the engine.

Q. In the cab or gang or tank?

A. About the gang way. I think I stood in the gang way.

Q. Did McKenzie get on the engine and ride down on it also?

A. Yes sir.

Q. Where did he ride?

A. I cannot say.

Q. Where were you when you asked McKenzie what he was doing down there?

A. I do not remember asking him that?

Q. Do not remember saying that to McKenzie?

A. No sir.

Q. Do you remember those words being spoken?

A. I do not. I do not remember those words being spoken by any one on that occasion. I asked him what he was doing when he passed me the reason he did not look out when I holloed.

Q. You were excited when Second Eighteen came in sight?

A. Yes sir, I was.

Q. As Second Eighteen proceeded down to the place of the collision did it explode the torpedo you had placed on the track?

A. Yes sir.

213 Q. What did you do with the other torpedo you had left?

A. Had it in my pocket.

Q. Please describe a torpedo and how it is placed on the track.

A. The torpedo I had on this occasion was a powder wrapped up in paper, wrapped up in foil and the ends wrapped around the rail.

Q. The weight of the train going over this torpedo then is what bursts and explodes it?

A. Yes sir.

Q. You are positive that the torpedo you placed for Second Eighteen was exploded after you got on the train?

A. Yes sir.

Q. When you left McGehees the night before this accident and came to Montgomery where did you go?

A. Home.

Q. Did you go any other place?

A. I disremember, I think I went to a moving picture show.

Q. Who was with you, if any one when you went to the moving picture show?

A. No one, I was by myself all that night.

Q. Did Darbey return to McGehees with you on the same train?

A. He did.

214 Q. Do you know where Darbey is now?

A. I do not.

Q. Whether he lives in Montgomery or where?

A. I do not know whether he lives here or not, I saw him here a few days ago.

Q. Is he still at work for the company?

A. I cannot say whether he is or not.

Q. What else did you do here in Montgomery besides go into the picture show and go home?

A. Nothing, I did not have any time.

Q. Did you get anything to read here in Montgomery on that occasion?

A. No sir.

Q. When you went out to flag did you take anything to read with you?

A. I did not.

Q. How long after this wreck before you stopped working for the company?

Objection by defendant.

A. About a week or ten days, I do not remember exactly.

Q. Did you draw your pay at the regular pay day?

A. I did not.

Q. When one ceases to work for the company and draws his pay at a time not at regular pay day is it customary for his
215 time check to show the reason?

A. It is.

Q. When you got your time check what was stated as a reason for your stopping?

Objection interposed by Mr. Taylor.

A. Causing accident. I called Mr. Elmore over the 'phone and asked him if I could get my time and he told me he thought he could arrange it, and Mr. Farley told me the next day they had to have some reason for me to get it and he would just put it down as causing accident and I accepted it that way.

Q. Did you request the officials to put in there "for causing accident"?

A. I did not.

Q. Did you accept the time check and endorse it?

A. Yes sir.

Q. What did you do, Mr. Taylor, after this accident, what were — engaged in?

A. I first went into the merchandise business; sold that out and the next thing I think I was on the United States jury.

Q. And then after that?

A. I got in that trouble when I was on the jury.

Q. I will ask you, Mr. Taylor, whether or not you would be willing to personally attend court as a witness in Henderson, Ky., if your expenses were paid?

Objection. Sustained.

216 A. If my bondsman would be willing, I would be willing.

Q. If your bondsman would be willing you would be willing to attend as a witness?

Objection by defendant.

A. Yes sir.

Objection interposed by Mr. Taylor.

Q. What were you engaged in and where did you live before you went to work for the Railroad Company the last time?

A. I was on the detective force, plain clothes force, police department here.

Q. For how long?

A. I stated yesterday that I had left the railroad about a year, it was about two years and I was on the police force all that time.

Q. Were you on the police force all during the interval of your first and second employment with the Louisville & Nashville?

A. Yes sir.

Q. Were you living here in Montgomery all the time?

A. Yes sir.

Q. Before you first went to work for the L. & N. Railroad what business were you engaged in?

A. I worked for the Seaboard Air Line before that.

Q. In what capacity?

217 A. Flagman.

Q. Were there any wrecks on the Seaboard Air Line while you were employed by it on any train that you were connected with?

A. No sir.

Q. How long did you work for the Seaboard Air Line?

A. About six months.

Q. Did you stop railroad- for the Seaboard or were you discharged?

A. I stopped and went to work for the L. & N.

Q. What were you engaged in before you went to work for the Seaboard?

A. Coast Line shops.

Q. How long did you work for them at the shops?

A. I do not know.

Q. You say you do not know where McKenzie was on Second Eighteen what part of the train he rode back to the scene of the accident?

A. He got on the engine, I know he did not get off, but I did not pay any attention as to what part of the engine he rode.

Q. Where was he and who was present when you and he were talking?

A. We did not have any talk.

Q. Didn't you just state that you told him that you tried to flag him and attract his attention?

218 A. I do, but that was just a question that passed.

Q. But where was that conversation had?

A. I think it was after we got to the wreck, sure it was.

Q. You said nothing at all to McKenzie until you got to the wreck?

A. If I did I do not remember it.

Redirect examination:

Q. Mr. Taylor, I believe you stated that when you saw Second Eighteen approach and when you had flagged it that the engineer answered your flag?

A. Yes sir.

Q. When First Eighteen passed you did or not you see any signals on that train which indicated that Second Eighteen was behind?

A. I did not, saw then on the front end.

Q. Were those signals on the front end?

A. Yes sir.

Q. Those signals you saw on the front end of First Eighteen indicated that Second Eighteen was following behind it?

A. Indicated that there was another train running on same schedule.

Q. Then after First Eighteen had passed you at the cattle guard you then went south placing a torpedo on the track, then went back to the cattle guard for the purpose of flagging second eighteen?

A. Went north and put a torpedo on the track and then went south and passed the cattle guard. I was past the cattle guard.

Q. When Second Eighteen approached were you not, before it reached you, south of the cattle guard?

A. I was right at the cattle guard when second Eighteen first showed up; I was just a little north of the cattle guard, then I walked up and just before it got to me I went back over the cattle guard.

Q. What time — the night before did you leave McGehees to come to Montgomery?

A. I do not know the exact hour, but somewhere between six and seven, seven-thirty, something like that.

Q. What is the distance from McGehees to Montgomery?

A. Nine miles.

Q. The day before, what opportunity for sleep and rest had you?

A. Conductor Powell's baby died and he had me to come in and I slept until dinner time, until about twelve or one o'clock.

Q. Who was Conductor Powell?

A. He was the regular conductor of work train crew.

Q. Then for that reason on May 14 conductor Rollo had charge of the work train?

A. Yes sir.

Q. The night that you came from McGehees to Montgomery I believe you stated that you went home?

A. Yes sir.

Q. For what purpose did you go there?

A. I went to take a bath and clean up a little.

Q. Did you take back to McGehees anything from Montgomery?

A. I did not.

Q. You returned to McGehees about 11:30 or 12 o'clock, I believe you stated?

A. Yes sir.

Deposition of R. C. Gorey, Jr.

Also the deposition of R. C. GOREY, Jr., taken at the same time and place and for the said purpose as stated in the caption.

Direct examination by N. P. Taylor, attorney for defendant:

Q. Please state your name, age, residence and occupation.

A. R. C. Gorey, Jr., age twenty-three, live at 301 North McDough Street, occupation engineer for L. & N. R. R.?

Q. On May 14, 1912, in whose employ were you and in what capacity were you then employed?

A. Employed by Louisville & Nashville Railroad Co. as locomotive engineer.

221 Q. What particular train were you in charge of?

A. On work train, unloading cinders.

Q. Do you remember the occasion of the wreck of First Eighteen at a point between Fort Deposit and Calhoun on the date of May 14, 1912, do you not?

A. Yes sir.

Q. At what time of the day did your work train begin to work at or near the point where the wreck occurred?

A. Must have gone to work about nine-thirty or ten o'clock in the morning. Some time before dinner.

Q. Was or not at that time W. H. Taylor Jr., acting as flagman for your work train?

A. Yes sir.

Q. What time that day did you first see W. H. Taylor?

A. I saw him about five-thirty or six o'clock.

Q. Did you see him a number of times after that and before the wreck?

A. Yes sir.

Q. Did you or not notice anything unusual about his appearance?

A. No sir.

Q. Was he at all times that morning and at times when you saw him previous to the wreck alert and attentive to his duties?

A. Yes sir.

222 Q. At what time after you had dinner on May 14, 1912, did your work train go out?

A. About 12:45 or one o'clock.

Q. From what station?

A. From Calhoun.

Q. Did Mr. Taylor go out in front of your work train from Calhoun?

A. Yes sir.

Q. Did you see him leaving?

A. Yes sir.

Q. How far could you see him on the way?

A. Could see him four miles and then a mile and a half with the exception of a little turn about twenty-five feet.

Q. What distance had he gone before your train left Calhoun?

A. I saw him traveling a mile and a half, he went around the curves and I gave him seven or eight minutes after he got out of sight.

Q. Then your work train followed him down to the point where you were at work when the collision occurred?

A. Yes sir.

Q. When you reached that point did you or not return with your work train to Calhoun?

223 A. Yes sir.

Q. For what purpose?

A. To let a south-bound freight train pass.

Q. What was that train?

A. First Seventeen.

Q. That was a double header?

A. It was.

Q. Who was the engineers on that train?

A. Swares and Arn.

Q. About what length of time passed after First Seventeen went south before the collision?

A. Thirty minutes.

Q. Can you state the time of the collision?

A. Yes sir, two seven, P. M.

Q. Did you notice anything about Taylor's appearance and his manner of walking as he left Calhoun going out and up Fort Deposit hill on that occasion?

A. Why he went right up there. Left and walked as fast as a man ought to walk.

Q. After your train had gotten to the point where they were at work did you hear conductor Rollo give to Clarence Hix a colored brakeman, instructions or send him with any message to Taylor, the flagman?

A. No sir, I did not hear him. I saw the colored brakeman go out there.

224 Q. Which direction did he go?

A. Went south.

Q. Did you or not notice him as he came back?

A. No sir.

Q. Now, Mr. Gorey, what first attracted your attention to the approach of First Eighteen, the train on which Mr. Holloway was?

A. My fireman called my attention to it.

Q. Can you say what distance the engine of First Eighteen was from the work train engine when you first saw it?

A. About four hundred and fifty feet.

Q. Where were you when your fireman called your attention to it?

A. I was in the cab of the engine.

Q. What did you do?

A. I blew a signal, warned the men on the train to look out,

something was going to happen. Reversed the engine, opened up the throttle and got off.

Q. Did your train move?

A. Yes sir.

Q. How much?

A. Did not move very much, the engine started slipping back, probably one car length before they hit.

225 Q. When you had backed up your engine one car length, what did you do?

A. Got off.

Q. Before it moved?

A. Just as it was starting I got off.

Q. Tell the examiner just what things you did on your engine after your attention was called to the approach of First Eighteen before you jumped off?

A. At the time my attention was called to it I looked out to see how close the train was. Then I reached up to the whistle and pulled three short blasts. Then I moved the reverse lever and opened up the throttle and then had to go to the gang-way to get out.

Q. What did you do when you got out?

A. I jumped down on the ground and kept moving.

Q. Did you run directly away from your engine?

A. I ran directly down the bank toward the fence. They hit about the time I got to the fence.

Q. About what distance is the fence from where your engine stood when you left it?

A. Thirty-five or forty feet.

Q. You had reached the fence when the collision occurred?

A. Yes sir.

226 Q. Did Holloway's train whistle before the collision?

A. I never heard it.

Q. Could you see Holloway, the engineer, after your attention was called to the approach of his train?

A. No sir.

Q. Did you notice for the purpose of seeing?

A. No, I never looked.

Q. But you are sure his train did not whistle?

A. I never heard it. I would have more than likely heard it had it blown.

Q. At what rate of speed was he making?

A. About thirty-five miles an hour.

Q. Did his train slacken speed at all from the time you first saw him until the collision?

A. Was not noticeable.

Q. On what side of the track with reference to the direction in which you ran did the engines fall?

A. To the left.

Q. That is on the opposite side from where you were?

A. Yes sir.

Q. Can you say how far your engine could have been seen by the engineer on Holloway's train as it approached north?

A. About five hundred feet.

Q. Did you ever measure the distance?

A. No sir.

227 Q. It is just your opinion from being familiar with the locality?

A. Yes sir.

Q. Where was your fireman when he called your attention to the approach of first Eighteen?

A. On the left side of the cab.

Q. And you did not see anything of Mr. Holloway, the engineer of First Eighteen before the collision?

A. No sir.

Q. Did you see Taylor after the wreck?

A. Yes sir.

Q. About what length of time after the wreck?

A. I suppose twenty-five minutes after the wreck, twenty minutes anyway.

Q. Where did you see him?

A. He came back to the point of collision.

Q. Whereabouts was he when you saw him?

A. I was in the caboose getting a drink of water when he came in.

Q. In what caboose?

A. In the caboose of our train.

Q. You do not know how long he had been in the caboose at that time, do you?

A. No sir.

228 Q. Mr. Gorey, in the case of a collision when the engineer desires to stop his train immediately what should he do in order to bring his train to an immediate stop?

A. If he is rolling down a hill it would not be necessary to do anything except open the sand valve and apply the brakes.

Q. How long would it take a man to do that?

A. Not less than a second.

Q. Then when he had applied sand and set the brakes is there any other thing the engineer can possibly do towards stopping his train?

A. No sir.

Q. Then when he has done that is there any occasion for his remaining on his engine longer?

A. No sir.

Q. How long should it take an engineer to apply the sand and set the brake and jump from the engine?

A. He should be able to do it in a second and a half if he gets out of the window.

Q. Suppose he should not go out of the window but go out of the gangway, how long should it take?

A. About two and a half or three seconds.

Q. How long, in your opinion, did it take you to give the three

229 signals you have spoken of on your engine of this occasion and to reverse your engine, open the throttle and jump from your engine?

A. Must have been about three seconds.

Q. Did you know Holloway?

A. Yes sir.

Q. How did his size, weight and height compare with yours?

A. He was about the same size man, maybe a little lighter.

Q. What is your weight?

A. About one hundred and fifty.

Cross-examination:

Q. Mr. Gorey, when did you look at your watch to see what time this collision occurred?

A. It was two nine when I looked. I had come back from the field.

Q. It was nine minutes after two when you had come back from where you landed to a place of safety to the place of wreck when you looked at your watch, which was the 2:09 and you estimated that about two minutes had elapsed?

A. Yes sir.

Q. What warning did you first have that the train was approaching?

A. My fireman called my attention to it.

Q. Was the train then in sight?

A. He says that he holloaed at me the third time before I seemed to understand what he said. The time I understood him it was in sight then. He told me afterwards he holloaed at me when he heard it coming.

230 Q. But it was after you saw the train that you gave the three short blasts of the whistle and reversed your engine?

A. Yes sir.

Q. In reversing an engine is it necessary to open a throttle and levers or is it done with one motion?

A. Two different levers.

Q. You operated then the two levers and immediately sought a place of safety for yourself?

A. Yes sir.

Q. Do you know how many cars were in this train that Holloway was pulling and what they were loaded with?

A. I do not know the exact number, about twenty-five of them loaded with resin and mahogany logs.

Q. How long have you been an engineer, Mr. Gorey?

A. About two and a half years.

Q. Have you ever been in a wreck?

A. Yes sir.

Q. While an engineer at the time of the wreck.

A. Not before this case, I was in a head-on collision while firing.

Q. In giving the time that you do that it would take a man to

get off an engine, that is when a man is calm and cool and not under stress of excitement, is it not?

231 A. I do not think that makes any difference, when a man gets excited. He gets off without thinking.

Q. It is sometimes safer to stay on an engine rather than leave it, is it not?

A. I do not think so. I have gotten off every chance I got.

Q. If an engine does not leave the track would it not be safer for a man to remain on the engine than to risk bræking his limbs and risking his life in leaving the train in motion?

A. Not in all cases, because they often times go through a car and their wreckage will knock the steam pipes loose and maybe scald a man if he stays on the engine.

Q. That is, however, a matter of opinion as to which would be safer, to leave the engine while it was moving or remain on it and risk being injured in that way?

A. It may be a matter of opinion, but I get off every chance I get.

Q. That is what you would do?

A. Yes sir.

Q. You say you did not see Mr. Holloway on the train at this time?

A. No sir.

Q. Did you see any one in the fireman's place?

A. No sir.

232 Q. Did you see any one on the train at all?

A. No sir.

Q. The fact of the business you were not looking at that time, you were trying to give your own crew warning and get to a place of safety yourself?

A. Yes sir.

Q. If Mr. Holloway had been in his place where he belonged and if there had been anyone in the place where the fireman belonged you could not say whether they were there or not?

A. I could not say. I glanced at the engine and turned in my cab.

Q. What in your opinion would be the distance a train going thirty-five miles an hour loaded as this train was, the character of track it was, could be stopped?

A. About twelve hundred feet.

Q. I will get you to state whether or not in your opinion this train could have been stopped after it first discovered the presence of the work train ahead as it was coming north in time to have avoided the collision?

A. I do not know when he discovered the presence of the work train, but from the point where he could have discovered it or seen it at once he would not have been able to stop.

Q. Can you say positively whether the brakes were applied on this train of Holloway's or not?

233 A. I do not know whether he applied them or not.

Redirect examination:

Q. Who was your fireman on that occasion?

A. His name was Westberk.

Q. Had Mr. Holloway on that occasion applied the sand and set his brakes immediately after he reached the point from where he could have seen your engine would not the speed of his train been greatly reduced by the time his engine reached yours?

A. It should have been reduced some.

Q. When the *same* is applied and the brakes set does it not immediately affect the stopping of the train?

A. No sir.

Q. When the brakes are set do they not immediately operate?

A. If they are applied in emergency they go on at once but the difference in the speed is not instant in the first second or two, we have never been able to notice it.

Q. But in that time it begins to reduce the speed?

A. Yes sir.

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Deposition of J. E. Lockhart.

Deposition of J. E. LOCKHART, taken at the same time and place and for the same purpose as stated in the Caption.

Direct examination by N. P. Taylor, attorney for defendant:

Q. Please state your name, age, residence and occupation?

A. J. E. Lockhart, residence Montgomery, Ala., age 28, occupation, assistant engineer of the Louisville & Nashville Railroad Company.

Q. How long have you been an engineer, Mr. Lockhart?

A. I graduated from the University of Vanderbilt in 1907.

Q. You are a civil engineer?

A. Yes sir.

Q. Mr. Lockhart, did you make any measurements, pictures, diagrams or views of the track and locality where the wreck occurred between First Eighteen going north and the work train stationed on the L. & N. tracks on the M. & M. division between Fort Deposit and Calhoun on May 14, 1912?

A. I made such maps, measurements and pictures in the month of January, 1913.

Q. Where is the map that you made on that occasion, Mr. Lockhart or rather what did you do with it?

A. I turned it in to the superintendent, Mr. J. I. McKinney and I understand it was sent to the company's attorneys at Henderson, Kentucky, through Mr. Jones, our legal attorney.

Q. What does that map show?

235 A. The map shows the location of the wreck and also a map of the track near the vicinity of the wreck approximately between the yellow board which is just north of the scene of the wreck and the over head bridge which is over a mile south of the scene of the wreck.

Q. Then between a point north of the wreck and the overhead bridge more than a mile south of the wreck this map shows the track and the distance from various points between those two points and the contour of the ground on either side, also the proximity of the track and elevation and grade?

A. Yes sir.

Q. Can you give us the distance, Mr. Lockhart, between the overhead bridge and the cattle guard south of the twenty-nine mile post?

A. Approximately 2,540 feet between the cattle guard and the center of the overhead bridge.

Q. Now you say approximately, do you mean that the variation would be very small?

A. Within five feet, say.

Q. Is the distance between those points as indicated on the map more accurate than the figures you now give?

236 A. Yes, it will be absolutely accurate as far as anybody can measure with a steel tape. The steel tape varies with the temperature, it stretches in hot weather and contracts in cold weather.

Q. Then all of the distances which are indicated on that map are in your opinion, as accurate as is possible to measure distances?

A. Yes sir.

Q. And will be more exact than the figures you now give?

A. Yes, they will be more exact.

Q. At the time you were there and made an examination of the scene of the wreck was there anything in the track where the track had been torn up that would indicate the exact position of the collision of the two engines?

A. Not on the track or in the track but there was on each side down from the embankment iron and timbers that located the wreck.

Q. Did you not on that occasion ascertain by using an engine for the purpose the point from which an engine located at the scene of the wreck could be first seen from an engine going north?

A. I did use one engine, however I did not have a second engine which would be higher above the track than the kind I stationed at that point to locate.

237 Q. You stationed an engine at the point where an engineer on an engine going north could first see the wreck and stationed a man on the track at the point where the wreck occurred?

A. Yes, that point, of course, is the position that I estimated the engine would be in.

Q. What distance did you find between the scene of the wreck the place where the engineer could first see and engine at the scene of the wreck?

A. About five hundred feet south of the location of the wreck.

Q. Was the estimated location of the first view of the wreck on the north bound engine?

A. Yes sir.

Q. Was the engine used on that occasion a similar engine to the

one on which Holloway was?

A. Yes it was a similar engine, in fact it was the same engine, number 1231, repaired and put back to service.

Q. How far is the cattle guard that you took that measurement of south of the point where the wreck occurred?

A. Approximately 3,900 feet.

Q. I have here three blue prints numbered one, two and three, are they not the same pictures taken by you and developed and on the back of which you endorsed what each of them were
238 and also the distance indicated in the pictures and which were sent to Henderson, Kentucky, as you have indicated in a previous answer?

A. Yes sir.

Q. I will ask you Mr. Lockhart to file these three blue prints with the Notary as a part of your deposition?

(Mr. Lockhart filed said blue prints and they are hereto attached as part of this file.)

Q. Did you make more than one map of this location?

A. No, I made only one.

Q. Have no copy of the original map?

A. No sir.

Q. As I understand you, that original map that you say was sent in and is now in the hands of the attorney for defendant in this case in Henderson, Kentucky, shows the topography of the location of the wreck and the distance between the various points south of the wreck and to the overhead bridge and the elevations along the track and also a profile?

A. Yes sir.

Q. What endorsement, if any, is upon the back or face of this map that you made?

A. I do not remember the exact caption I put on there but it would read something like this "Map of the situation near Calhoun, Ala., in the case of Holloway vs. The Company," and it was
239 dated January 1913; some particular date which I do not recall.

Q. And you consent that they may be filed and so endorsed and read as a part of your deposition in this case?

A. I do.

Q. Mr. Lockhart, in making that map does it show the distances from the point of beginning to the point of ending by stations?

A. It does.

Q. What is the distance on the map between the stations as indicated?

A. There are two different scales on the one map, one of them shows the profile and the map of the vicinity of collision, is drawn on a scale of 50 feet to one inch, that is the distance from station to station is 100 feet. The other one is the map of track between mile post 518 and over head bridge south of mile post 519 and the scale is 200 feet to one inch.

Q. Those facts are shown on the map itself?

A. Yes.

Q. So that from the map any distance between any point indicated on the map can be easily ascertained?

A. Yes sir.

240 Cross-examination by Mr. A. Y. Clay:

Q. The map you speak of Mr. Lockhart does it show the curves?

A. Yes, sir.

Q. Do you know what degree curve this was immediately south of the scene of this wreck?

A. I do not recall the particular degree of curve, however, it is shown on the map as it is actually on the ground. I know that from my own measurements and work and I state this, that the degree is correct as shown on the map.

Q. Does the map you speak of show all the curves between mile post 518 and this overhead bridge?

A. The small scale map does, that is the one relating to the 200 feet to one inch.

Q. Then the map you speak of shows the degree of curve and the grade of the track from mile post 18 to this overhead bridge?

A. It shows the degree of curve to the engine, I do not remember whether I wrote the degree of curve on the map or not.

Q. Could an engineer take the map that you have drawn and tell from the map what degree of curve it is?

A. Yes, sir.

Q. Upon the maps that you have made and the blue prints filed this morning, there are marked the place where, in your
241 opinion, this wreck took place?

A. Yes, sir.

Q. I will get you to state how you arrived at that opinion?

A. The general location of the wreck as shown of the ground by the wreckage that gives the general location of the wreck and it is still there.

Q. This wreck was there in January and the wreck itself occurred May before did it not?

A. Yes, it was about a year before May 1912, this was January 1913.

Q. The point then marked upon your maps as the place where the wreck occurred is where the wreckage is on the ground?

A. Yes.

Q. That is all you know where the wreck took place?

A. No, I have in addition to that some information that I got from the section hand who assisted me in making the measurements and he was at the scene of the wreck at the time the wreck occurred. This man pointed out to me on the track where he remembered the front of the engine to have been at the time when the 1231 engine was first seen coming around the curve.

Q. Do you know how far the collision knocked the other train back before it pitched over the embankment?

A. From the location of the wreckage and the point that
242 this section hand pointed out as the location of the front of the engine I would say somewhere about one hundred feet.

Q. Is the overhead bridge north or south of the cattle guard?

A. The overhead bridge is south of the cattle guard.

Redirect examination:

Q. Mr. Lockhart, then in determining where the engine of the work train stood where the wreck occurred you reached the conclusion from what the section hand told you that he saw at the time of the collision?

A. Yes, sir. I had the corroboration of it from his foreman in a second-hand manner: Mr. Shaw previously told the foreman that was about the location of the engine.

Q. The section hand from whom you got the information as to the location was there at the time of the collision?

A. So he said, yes.

Deposition of A. E. Parker.

Also the deposition of A. E. PARKER, taken at the same time and place and for the same purpose as stated in the caption.

Direct examination by N. P. Taylor, attorney for defendant:

Q. Please state your name, age, residence and occupations.

A. A. E. Parker, thirty-one years old, 412 Jefferson St., Montgomery Ala.; engineer Louisville & Nashville Railroad, M. & M. Division.

243 Q. How long, Mr. Parker, have you been engaged as engineer in the employ of the L. & N. Railroad Company?

A. Have been employed with the company eight years; have only been running just a little over one year, about thirteen months.

Q. You have been an engineer in charge of a train for that company for about thirteen months last past?

A. Yes, sir.

Q. Within that time what was your employment?

A. Fireman.

Q. On May 14, 1912, were you engineer on second Eighteen on the M. & M. Division between Fort Deposit and Calhoun?

A. Yes, sir.

Q. On that day in the afternoon while you were going north on Second Eighteen I will ask you if you saw W. H. Taylor who was flagging on the work train then engaged at work between Fort Deposit and Calhoun?

A. Yes, sir.

Q. At what point did you see him?

A. He was south of mile post 519 and I cannot tell you exactly how far it was from the mile post.

Q. With reference to the cattle guard at that point?

A. He was just over the cattle guard south of it.

Q. On which side of the track going north was he?

A. On the right hand side.

244 Q. Coming around the curve before reaching the cattle guard for what distance could you see a man standing at the cattle guard?

A. I could see him say 250 yards.

Q. Did he on that occasion flag your train second eighteen?

A. Yes, I considered him flagging all right. He showed me his red rag.

Q. You saw the flag what distance before you got to him?

A. Just as I got around the curve I could see him.

Q. When you could first see him you saw him standing to the right of the track a little south of the cattle guard?

A. Yes, sir.

Q. Did you stop your train at that point?

A. I got by there a little distance, maybe two or three cars.

Q. Did you see any one else at that point?

A. Just as I got down even with him I saw this fellow McKenzie flagging on First Eighteen, I saw him approach the other curve 150 or 175 yards from him.

Q. That is, where your engine Second Eighteen reached the cattle guard where Taylor stood you then saw McKenzie some 150 or 175 yards further north of that point?

A. Yes, sir.

Q. Did he give any signal?

A. Yes he gave me watch out signal.

245 Q. Then did Taylor get on your engine?

A. He came up to my engine and as McKenzie got up I think he got up on the tank, up to the arm rails and I asked him what are you doing here. I got off on the ground and then I got back on the engine, thought I would ease on down and see what had happened, thought I would pull down there. Whether he got up and rode any I do not think he did. McKenzie either asked him "what are you doing here" or he asked McKenzie, I do not remember; I never paid much attention.

Q. Didn't Taylor and McKenzie both go down on your engine?

A. McKenzie did. I am not positive about Taylor. I think he stayed there because there was two twenty-one following straight on down. I rushed on down there and put out my flag as soon as I saw Taylor.

Q. When you saw Taylor there he had flagged you to go back?

A. Yes.

Q. Was that the purpose for giving warning for 221 that was behind you?

A. Yes, to keep them from hitting me.

Q. Do you or not know what became of 221?

A. I do not think they ever left Fort Deposit. They did not get away at the time I left; I thought they were going to follow me away. Before they left I think they got a message that this wreck had occurred. I did not learn anything of the approach of 221 excepting they came down after some little time, I suppose fifteen
246 minutes after we all stopped; assisted my train and pulled it up the hill.

Q. Did you learn from Taylor the cause of the trouble ahead?

A. No, sir. I asked McKenzie what had happened down there, and he said, I do not know, they have hit something.

Q. How did you run then the balance of the way down to the scene of the accident?

A. I run very slow.

Q. Did you see anything more of Taylor after you reached the scene of the accident?

A. I saw him some time after that.

Q. Really do not know how he got there?

A. No, sir.

Q. You think McKenzie went down on your train?

247 A. Yes, I am sure he went on down with me.

Q. How far ahead of you or what length of time ahead of you was First Eighteen on which Holloway was engineer?

A. He was not very far because I followed him right away very close. Mr. Holloway had been having a great deal of trouble that day with his steam and I had 42 empties in my train and as soon as I got him over the hill I give him about ten minutes' time ahead of me.

Q. Going down the hill of Ft. Deposit you do not have to use steam?

A. No.

Cross-examined by A. Y. Clay, attorney for plaintiff:

Q. Mr. Parker, how long had you known Mr. Taylor at this time?

A. I don't believe I had ever seen him before to know him, until that time.

Q. How long had you known Mr. McKenzie?

A. Had just known him by name, of course I had seen Mr. McKenzie a time or two.

Q. You say as you were going North you could see Taylor 250 yards ahead of you at the cattle guard?

A. Yes.

248 Q. What did you do when you first saw him?

A. I answered his signal and applied my brake.

Q. You had forty empty cars?

A. There were 40 or 42, I disremember which, I know I had 40 or 42, seemed to me like 42 but will say 40 to be sure.

Q. Did you stop as soon as you could?

A. No, I did not stop as soon as I could because in a train of 40 empties you can stop mighty quick going down like I was. Don't suppose I was running over 18 miles an hour when I saw the flag.

Q. When you saw Taylor what signal did he give you?

A. He first showed me his flag and stuck it back.

Q. You say that was south of the cattleguard that Taylor was standing?

A. Yes, south.

Q. About how far in your opinion?

A. I don't suppose it was over ten or fifteen yards.

Q. You say you ran past Taylor before you stopped?

A. Yes, I passed him two or three car lengths before I stopped. I could have stopped right even with him but the way he flagged

me I took it for granted he was probably flagging some work gang. I kinder reversed my brakes just to see what he said.

Q. When you passed him was he on your side of the train?

249 A. Yes, sir.

Q. Did he say anything to you as you passed?

A. Said there is a work train down there, that is all.

Q. And then did he — right up to you at the engine when you stopped?

A. No, not at the time I got stopped. I suppose he saw the other flagman come back up there and then he made an effort to come where I was at. They both meet me about the same time.

A. Both McKenzie and Taylor?

A. Yes.

Q. Had Taylor said anything else except there was a work train ahead?

A. That was all he said, there was a work train down there. McKenzie came up and said, "we have run through somebody, something, I don't know what it is." McKenzie was on the rear end of his train.

Q. What did Taylor say?

A. The words that passed between one or two of them? "What are you doing here," I don't remember which one asked it.

Q. What was Taylor's expression when McKenzie said he had run through something?

A. I don't know, you might imagine how a fellow would look when something had happened to him. He looked excited. I asked him why he left Eighteen by? He said he tried to stop Mr. Holloway. I said I would have hit him with something.

250 Q. Did your train explode any torpedoes going down hill?

A. No, sir.

Q. On what part of train did Taylor ride back to the scene?

A. I do not know. Do not know whether he rode back on train or whether he walked down.

Q. How far were you when you stopped from the scene of the wreck?

A. I was over 400 yards, I guess may be 450 yards.

Q. What is the character of the track immediately south of the place where the wreck occurred?

A. It was right on a very sharp curve.

Q. Could anyone on a train going north plainly see the work train in time to stop?

A. No, sir.

Q. Do you know how many flagman the work train had out?

A. I do not know, but that one that they had south.

Q. Are you familiar with the rules of the Company?

A. Yes.

Q. You are pretty well posted on them?

A. Of course there are lots of them I would have to look up.

Q. Are you familiar with the rule of the company that provides when a work train is occupying the main track in a position where

it cannot be plainly seen that it is the duty of the conductor to send out two flagman?

251 A. Yes, the rule requires a man to send out the second flagman, to see that the other man is flagging.

Q. Is he supposed to stay out until the train appears, what becomes of the second man?

A. No I do not think that the rule requires that. It just says he should send out the second man to see whether the other man was flagging properly. That is about all I think there is to it.

Q. Rule 97 E. I will ask you if that rule doesn't provide or read as follows: "When a work extra is working under protection of signals and the flagman is instructed to notify approaching trains to look out for such working extras at a certain point or points, the conductor of the work extra must write and send two copies of instructions for each train, signal the flagman of the work extra must deliver one copy each to the engineer and conductor of all train signals, copies of instructions should be made at one writing by use of carbon paper. As an additional precaution in all such cases the work extra when standing at a place where it cannot be plainly seen by an approaching train must be protected by a second flagman."

A. That is right. He should stay there until the work train would come. If the work train should move where it could be plainly seen he would have a right to return back to his train.

252 Q. You do not know how many flagmen were out protecting the work train as number First Eighteen approached?

A. No, sir, that was the only one I saw.

Q. You do state that the work train was in a position where it could not be plainly seen by an approaching train?

A. Yes.

Q. Did you go down to the place of the wreck?

A. Yes.

Q. Give your best opinion as to the distance the work train could be seen by a train going north.

A. If on the curve and the embankment was there he could not have seen the train over eight car lengths.

Q. Please give that in feet?

A. It would be about 190 feet.

Q. Do you know what Holloway's train was loaded with?

A. Part of it I do, of course I do not know all of it, it was loaded with lumber, mahogany logs and this salze they get out of Pensacola.

Q. From your experience as an engineer, what would you say the distance a train loaded as that train was going down grade at a rate of 30 or 35 miles an hour could be stopped in emergency?

A. This depends a great deal in your breaking, because some trains you can really handle better than you can others. If
253 the brakes are good and in perfect working condition it would take at least 350 yards to stop a train like that was.
300 yards anyway.

Q. Do you know where Mr. McKenzie is now?

A. I do not.

Q. What is his name, McKenzie or McKinney?

A. McKenzie, we always called him.

Q. He is not in the service of the Company?

A. I do not know that, unless he has gotten back recently. I do not know whether he is back or not.

Redirect examination:

Q. Mr. Parker, when you saw Taylor there at the right of the track south of the cattle guard and when he had flagged, you immediately answered his flag?

A. Yes, I answered his signal.

Q. By that answer indicated to him you had seen his flag?

A. Yes.

Q. Then you say he put his flag back under his arm?

A. Yes, sir.

Q. He stood there did he until you had some up?

A. Yes, stepped off the right-of-way about six or eight feet.

Q. Then he came up to your engine and reached your engine about the same time McKenzie did?

A. Yes, sir.

254 Q. When you approached Taylor at the cattle guard and after he had flagged you did you not point on down the road ahead of you?

A. Yes, from his signal I took it for granted that it was just a section crowd down there at work; he told me there was a work extra down there.

Q. Before you reached him and before he had said anything to you, you pointed on ahead?

A. Yes, sir.

Q. When he came up and when McKenzie came up to your engine didn't you ask McKenzie what had happened?

A. Yes, sir.

Q. Didn't he tell you that First Eighteen had run into something?

A. Yes, sir.

Q. Then did you or not ask Taylor why he didn't flag Holloway there and did he not tell you that he had flagged him but that the engineer had his head down in the cab and didn't hear him?

A. Yes, I told him I would have hit him with a rock or something.

Q. Did he tell you anything else about his efforts to stop that train?

A. No, sir, not more than he tried to signal him down and he did not pay any attention to him, or rather did not see him; said he had his head down in the cab like he was working on something.

255 Q. When you say that at that point where the work engine was on the track that the train going north would only see the work engine a distance of eight or nine car lengths, you do not mean to be understood as saying you had measured that, or that you have stopped there at any time for the purpose of looking or ascertaining the distance?

A. No, sir.

Q. You have not been over that road many times have you Mr. Parker?

A. No, sir, not at that time. I have been over it quite a little since then.

Q. Did you ever stop your train there and get out for the purpose of ascertaining the distance the work train could be seen?

A. I have never stopped but have paid close attention to it running by there, and when doing it would size up the distance.

Q. But never measured any distance?

A. No, sir.

Q. Then it is apparently guess work with you as to what distance it could be seen?

A. Yes, sir.

256 Q. When it is desired by the engineer to stop his train in emergency what does he need to do to his brakes?

A. He carries his brake handle over in an emergency position as far around as it will go. It has six positions one holding position, one releasing and emergency in the fifth position and the sixth one is more position.

Q. Then in order to set the brakes in emergency?

A. You push the brake on around in the emergency position as far as it will go.

Q. What distance do you have to push it?

A. That is not very far. From right position to normal position; you only move the brake handle about two inches.

Q. Just push your brake handle two inches?

A. Yes it is pulled about like that (indicating with hand). The position is about half of that dial. You go half way around the dial.

Q. Is it necessary or desirable to apply the sand in case you fail to stop immediately?

A. Yes, you apply sand.

Q. Then when you have pushed the lever which applies the sand and push your emergency brake into position, is there anything else the engineer can do to stop?

257 A. Nothing except to reverse his engine and that will not help him to stop it entirely. He cannot reverse his engine if he has a very poor engine brake.

Q. After the engineer had applied the sand and set his brakes there is nothing left for him to do in case of danger except to get off the engine?

A. That is all.

Recross-examination:

Q. Mr. Parker, what was Taylor doing when you first saw him?

A. He was standing still; looked to me that he was whittling on one end of his flag staff.

Q. You were not positive he was whittling?

A. I do not know whether he had a knife in his hand or whether he just had his hand on the staff. When he saw me coming around the curve he showed me his flag.

STATE OF ALABAMA,
Montgomery County:

I, Effie Turnipseed, a notary public in and for said state and county, do certify that the foregoing depositions of R. C. Gorey, Sr., W. H. Taylor, Jr., R. C. Gorey, Jr., J. E. Lockhart, A. E. Parker and J. O. Gibson were taken before me at the time and place stated in the caption, that said witnesses were first duly sworn before giving their said deposition, that the testimony of each — said witnesses
 258 was taken down by me in short hand in the presence of the witnesses and thereafter said notes were correctly transcribed by me; that the signing of said transcribed depositions by said witnesses was expressly waived by Mr. A. Y. Clay, attorney for the plaintiff and Mr. N. P. Taylor, attorney for the defendant both of whom were present at all times during the taking of said depositions.

[SEAL.]

EFFIE TURNIPSEED,

Notary Public.

My commission expires January 13, 1916.

Deposition of J. O. Gibson.

The plaintiff then introduced those witnesses who testified orally in rebuttal as shown by the official stenographer's Transcript of Evidence, and at the conclusion of said oral testimony read the deposition of J. O. Gibson, which is as follows:

(The Clerk will here copy said deposition.)

Deposition of J. O. GIBSON taken at the office of Miss Effie Turnipseed by agreement of the parties to be read as evidence on behalf of plaintiff in the trial of case now pending in the Henderson Circuit Court wherein E. S. Holloway, Adm'r, etc., is plaintiff and the Louisville & Nashville Railroad Co. is defendant. The witness first being duly sworn testified as follows:

259 Direct examination by Mr. A. Y. Clay, att'y for plaintiff:

Q. Please state your name, residence and occupation?

A. J. O. Gibson, 302 Houston Street, Montgomery, Mercantile business.

Q. How long have you lived in the city of Montgomery?

A. I suppose about something like six or seven years.

Q. How long have you known Mr. W. H. Taylor, Jr.?

A. About three and a half years I guess, personally.

Q. Have you ever served on the police force in the city of Montgomery?

A. I have.

Q. At what time was that?

A. I served three years and three months. I resigned last February first, that will be last September three years ago.

Q. Who is chief of police of Montgomery?

A. Chief Taylor.

Q. Is that the father of W. H. Taylor, Jr.?

A. Yes.

Q. Do you think you are acquainted with Mr. W. H. Taylor's, Jr., reputation in this community among his neighbors and acquaintances and those who know him for general moral character?

A. Yes.

260 Q. Is that reputation good or bad?

A. It would be bad.

Cross-examination by Mr. N. P. Taylor:

Q. Mr. Gibson, do you know of the general reputation of W. H. Taylor, Jr., in the city of Montgomery among his friends, neighbors and acquaintances for truth, veracity, honesty and integrity?

A. I would not want to say that.

Q. Do you know his general reputation?

A. I think I do through the general public.

Q. Is it good or bad for those things I have mentioned?

A. I would not swear I would not believe him on oath.

Q. To repeat my question, Mr. Gibson, do you know the general reputation of W. H. Taylor, Jr., in the city of Montgomery among his friends, neighbors and acquaintances for truth, veracity, honesty and integrity?

A. No, sir, I do not know.

Q. You mean to say you do not know his general reputation for those things?

A. No, I do not for truth and veracity.

Q. You have just stated you would not say that you would not believe him on oath?

A. No, I said I would not swear that I would not believe him on oath. This is what I say; that I would not swear that
261 I would not believe him on oath.

Q. Do I understand you to say that you do not know what his general reputation is in this community for truth and veracity?

A. No, sir, I would not say that I know it for truth and veracity.

Q. You never heard that part of his character discussed?

A. No, sir, never had any occasion.

Q. Did you ever hear his character and reputation for honesty and integrity called in question or discussed?

A. No, sir, not for honesty.

Q. Then your answer to Mr. Clay's question merely includes his moral character?

A. Yes, his moral character.

Q. What do I understand you to mean by his moral character?

A. Well, the best way I can put that is that he would get into fights and get into trouble of different kinds.

Q. But you have never heard his reputation or character
262 along any other lines than that you mention called in question or discussed?

A. No sir.

Q. Now when you speak of his reputation for morality do you speak of your own knowledge from his acts and deeds?

A. Well, not altogether.

Q. But you do in part refer to what you yourself know about him?

A. Yes, in part and what I have heard from the general public and general conversation between the general public.

Q. What did I understand your business to be, Mr. Gibson?

A. Mercantile, general merchandise.

Q. Where is your place of business located?

A. 302 Houston St.

Q. How long have you been in your present business?

A. Started in there the first of last February.

Q. Before that time you were on the police force?

A. Yes.

Q. You resigned in February, I believe?

A. Yes, the first of February.

Q. Do you or not, Mr. Gibson, know it to be a fact that W. H. Taylor, Jr., has testified in the courts in Montgomery and Montgomery county a very great many times?

A. No sir, I do not.

Q. Was or not W. H. Taylor, Jr., on the police force during
263 the time that you were on that force?

A. A part of the time, I do not know how long, but a part of the time he was on the force at the same time I was.

Q. At the time you were on the force his father was chief of police?

A. Yes sir.

STATE OF ALABAMA,

County of Montgomery:

I, Effie Turnipseed, a notary public in and for said state and county aforesaid do certify that the foregoing deposition of J. O. Gibson was taken before me at the time and place stated in the caption, that said witness was first duly sworn before giving his said deposition, that the testimony of said witness was taken down by me in shorthand in the presence of the witness and there after said notes were correctly transcribed by me; that the signing of said transcribed deposition by said witness was expressly waived by Mr. A. Y. Clay, attorney for the plaintiff and N. P. Taylor, attorney for the defendant, both of whom were present at all times during the taking of said deposition.

[SEAL.]

EFFIE TURNIPSEED,

Notary Public.

My commission expires January 13, 1916.

My fee \$3.00 paid by A. Y. Clay, attorney for Plaintiff.

264 Said Commission attached to above deposition is here copied:

It is agreed between the parties hereto that Miss Effie Turnipseed may and she is hereby named as a commissioner to take the depositions of divers witnesses as the parties hereto, through their at-

torneys, may agree upon and to issue subpoenas for the attendance of said witness if necessary.

E. S. HOLLOWAY, *Administrator, etc.,*

By A. Y. CLAY, *Attorney.*

LOUISVILLE & NASHVILLE RAILROAD CO.,

By N. P. TAYLOR, *Attorney.*

The evidence of all the witnesses whose depositions were read as above indicated, both in chief and in rebuttal is made a part of the aforesaid Transcript of Evidence and of this Bill of Exceptions.

This was all the testimony offered by either party on the trial of this case.

During the trial the defendant moved the Court to discharge the jury from the further consideration of this case on the ground that defendant's rights had been prejudiced by the circulation among the jury of an article, which appeared in the Henderson Daily

Gleaner, concerning said case, which motion was supported
265 by an affidavit of Defendant's counsel. The court overruled said motion to which ruling of the Court the defendant at the time excepted and still excepts.

At the conclusion of all the evidence, the defendant moved the court to instruct the jury to find for the defendant, which motion the Court overruled, and to which ruling of the court the defendant excepted at the time, and still excepts.

Defendant then moved the court to give the jury the following instructions, numbered *b, c, d, e, f,* and *g,* which motion the court overruled, to which ruling the defendant at the time excepted, and still excepts. Said instructions are in full as follows, viz:

The court instructs the jury that the plaintiff is not entitled to recover from the defendant if they shall believe from the evidence that the widow of John G. Holloway, deceased was not dependent upon the said decedent for support; so if you shall believe from the evidence that she was not so dependent you will find for the defendant.

c. If you shall believe from the evidence that defendant's flagman, W. H. Taylor, Jr., flagged the train on which John G. Holloway was engineer, at the time the accident complained of occurred, in time for the said Holloway, by the exercise of ordinary
266 care, to have stopped his train before colliding with defendant's work train; and if you shall further believe from the evidence that the said Holloway was not on the look out at the time the said Taylor flagged said train, if he did so, then the law is for the defendant, and the jury will so find.

d. Though you may believe from the evidence that the deceased John G. Holloway lost his life on account of the failure of defendant's employee to flag the train on which said decedent was employed as engineer, and shall award damages against the defendant therefor, yet if you shall also believe from the evidence that but for the failure of the said Holloway to exercise ordinary care for his own safety, if he did so, at the time in question, his death would not have occurred, then in that event you will deduct from said

damages an amount equal, or in proportion to the negligence attributable to the said Holloway on said occasion.

e. It was the duty of said Holloway, after he had done all he could do to stop his train, to take such steps as might be available to him to escape injury from an impending collision with defendant's work train, and if you shall believe from the evidence that he failed so to do, then you shall find that he was guilty of contributory negligence, and shall diminish the damages awarded against

the defendant in an amount commensurate with the negligence attributable to said Holloway as aforesaid.

f. If you shall believe from the evidence that the point where the collision occurred was dangerous, and was known, or by the exercise of ordinary care could have been known so to be by the said Holloway, then in that event, it was his duty to exercise such care in operating his engine at said point as was commensurate with such danger, and if you shall believe from the evidence that he failed to exercise such care you will find that he was guilty of contributory negligence, and will diminish any damages you may award against the defendant by an amount equivalent to the negligence attributable to the said Holloway as aforesaid.

g. If you shall believe from the evidence that at the time the defendant, Holloway, lost his life, he was operating his engine at a rate of speed in excess of the schedule rate of speed permissible for similar engines engaged in similar service at the point where the injury occurred, if he was so doing, then in that event you will find that he was guilty of contributory negligence, and will diminish any damages you may award against the defendant by an amount equivalent to the negligence attributable to the said Holloway, as aforesaid.

268 The court, on its own motion, gave the jury the following instructions numbered, 1, 2, 3, 4, 5, 6, 7, to the giving of which the defendant at the time objected and its objection being overruled it excepted at the time and still excepts.

1. Gentlemen of the Jury, the court instructs you that it is admitted by the pleadings and must be taken as true, that John G. Holloway met his death at the time and place stated * * *

269 as the result of a collision between two trains on the defendant's railroad, and that the said John G. Holloway was at the time in the employ of the defendant as engineer on one of said trains. The court further instructs you as a matter of law that the defendant company was at that time engaged in commerce between several of the States, and that the said John G. Holloway was at the time of his death employed in commerce between several of the States.

2. The court further instructs you that it was the duty of the defendant company, by and through its officers, agents or employes, to give to those in charge of the train upon which the said John G. Holloway was engineer reasonable warning of the presence of the work train of the defendant upon its main track at the time in question by placing torpedoes upon its track or by flagging, or both, or in some other reasonable manner while such train was a

sufficient distance from said work train as would have enabled those in charge of such moving train to have stopped the same by the exercise of ordinary care in time to have avoided the collision with said train; so, therefore, if you shall believe from the evidence that the officers, agents or employes, of the defendant failed to give such reasonable warning to the engineer, or other person in charge of the train upon which said Holloway was employed either by placing upon the track torpedoes or by flagging for a sufficient distance from said work train as would have enabled said engineer or other person in charge of said moving train by the exercise of ordinary care and precaution to have stopped the same in time to have avoided said collision and that as the result of such failure, if any, the collision, occurred and said Holloway killed, then in that event you should find for the plaintiff, the measure or recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed.

But unless you shall so find and believe from the evidence as above required you should find for the defendant.

3/. The court further instructs you that even though you may believe from the evidence that the defendant by or through its officers, agents or employees was guilty of negligence as above defined, if any there was, yet if you shall further believe from the evidence that the deceased, John G. Holloway was also negligent, that is failed to keep a lookout for signals, if he did so fail, or failed to use ordinary care to stop his train after discovering the work train was on the track, or failed to exercise ordinary care to leave his train and prevent injury to himself, if he did so fail, after discovering the danger if any, and that but for such contributory negligence; if any, the accident and injury would not have occurred and his death resulted, yet such contributory negligence, if any, will not bar or prevent recovery by the plaintiff under the second instruction, but in such event the damages, if any, shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to the said John G. Holloway by reason thereof.

4. The court further instructs you that it was the duty of the deceased, John G. Holloway, to use every reasonable effort at his command after having been warned or signalled of the presence of the work train upon the track or after having discovered its presence on the track, to stop said train and prevent said collision and protect himself from danger or death, if it could have been done by the exercise of ordinary care, and the failure on his part so to do, if any, would be contributory negligence as defined in these instructions; but, the court instructs you that if you shall believe from the evidence, that the deceased, John G. Holloway, was through the negligence, if any, of the defendant, its officers, agents or employes, placed in a position of peril where he believed or had rea-

sonable grounds to believe there were open to him two or more possible means of escape, the fact that he adopted one of such means of escape and was killed will not render him guilty of contributory negligence even though the jury may believe, from the evidence, that
273 had he adopted some other means of escape he would not have been killed, if the said Holloway, at the time believed, and had reasonable grounds to believe that the means he adopted were the safest for him considering his position and the duty he owed to those upon the train he was operating.

5. The court further instructs you that if you shall believe from the evidence that the defendant's flagman, W. H. Taylor, Jr., flagged the train on which John G. Holloway was engineer at the time the accident complained of occurred, in time for the said Holloway by the exercise of ordinary care to have stopped said train before it, collided with defendant's work train, and if you shall further believe from the evidence that the said Holloway was not on the lookout at the time said Taylor flagged said train, if he did so, then in that event said deceased, Holloway, was guilty of contributory negligence and you should so find, and will, in that event, diminish any damages you may award against the defendant by an amount in proportion to the negligence, if any, attributable to the said Holloway, as aforesaid by reason thereof.

274 6. The court further instructs you that if you shall believe from the evidence that at the time the deceased, Holloway, lost his life he was operating his engine at a rate of speed in excess of the schedule rate of speed permissible for similar engines engaged at similar service at the point where the injury occurred, if he was doing so, and if in doing so he helped to cause or bring about the accident, then in that event you will find that he was guilty of contributory negligence and will diminish any damages you may award against the defendant by an amount in proportion to the negligence, if any, attributable to the said Holloway as aforesaid, on account thereof.

7. The court further instructs you that by negligence as used in these instructions means the failure to use ordinary care, and ordinary care as used in these instructions *is* means such care as an ordinary prudent person would usually exercise under the same or similar circumstances as proven in this case.

Given.

J. W. HENSON, *Judge*.

The instructions given and the instructions refused as above set out were all that were offered, given or refused.

Came defendant, and tendered this its bill of exceptions, with a transcript, in duplicate, of the official stenographic report of the evidence, and, on its motion, said bill of exceptions is ex-
275 amined, signed, attested and approved by the court, and said transcript of evidence is examined, signed, attested and approved by the judge, and it is now ordered that they be filed and made part of the record without being spread on the order book; and it is now certified that this bill of exceptions, with said

stenographic report of the evidence contains all the evidence in this case, and is true and correct in every particular.

J. W. HENSON,
Judge Henderson Circuit Court.

On October 20th, 1913, the defendant executed Supersedeas Bond. Said Supersedeas Bond is here copied:

Supersedeas Bond.

Henderson Circuit Court.

E. S. HOLLOWAY, Administrator of the Estate of John G. Holloway,
Deceased, Who Sues for the Use and Benefit of Myrtle Holloway,
Widow of John G. Holloway, Deceased, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

276 We undertake that the Louisville and Nashville Railroad Company will pay to the E. S. Holloway Administrator of John G. Holloway, deceased, all costs and damages that shall be adjudged against said Louisville and Nashville Railroad Co. on the appeal from the Judgment of said Court, rendered June 3rd, 1913, for the sum of (\$32,990.00) Thirty two thousand nine hundred dollars, with 6% interest from June 3rd, 1913, also that said Louisville and Nashville Railroad Co. will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the Court passing upon said appeal may render or order to be rendered by the inferior Court, not exceeding in amount or value the said judgment appealed from; also that said Louisville and Nashville Railroad Co. will satisfy all rents, hire or damages accruing during the pendency of said appeal, upon or to any property of which said E. S. Holloway, Adm'r of John G. Holloway, Dec'd, may be kept out of possession by reason of said appeal.

Witness our hands, this October 20th, 1913.

LOUISVILLE & NASHVILLE RAILROAD CO.,

By JOHN C. WORSHAM, *Att'y.*

NATIONAL SURETY CO.,

By GUS STARR, *Att'y in Fact.*

R. F. CRAFTON, *Clk.*

By A. HATCHETT, *D. C.*

277 Upon the execution of Supersedeas Bond Certificate of Supersedeas was issued. Said Certificate of Supersedeas is here copied:

Certificate of Supersedeas.

STATE OF KENTUCKY,

Clerk's Office of the Henderson Circuit Court:

I do certify that an appeal has been granted from this Court from a judgment obtained by John G. Holloway's Admr. against Louisville and Nashville Railroad Co. for (\$32,900.00) Thirty two thousand, Nine hundred dollars in the Henderson Circuit Court at its May term, 1913, and that a Supersedeas bond has been executed. Wherefore the appellee and all others are commanded to stay proceedings on the judgment.

Witness my hand as Clerk of said Court this 20th day of Oct., 1913.

R. F. CRAFTON, *Clerk*,
By A. HATCHETT, *D. C.*

Sheriff's endorsement on reverse side is here copied:

278 Executed on the within named John G. Holloway's Adm'r
by delivering to A. Y. Clay, attorney, a true copy hereof.
Oct. 21st, 1913.

A. H. ABBOTT, *S. H. C.*,
By R. B. ESTERN, *D. S.*

At a subsequent day of Jan., 1914, term of Henderson Circuit Court; Monday, Jan. 5th, 1914, the following order was entered in the above styled case. Said order is here copied:

Order.

It is ordered by court that this case be suspended from the docket awaiting the action of the Court of Appeals.

At a subsequent day of May, 1915, term of Henderson Circuit Court, Monday, May 3rd, 1915, the following order was entered in the above styled case. Said order is here copied:

Order.

On motion of plaintiff by attorney, it is ordered that the Mandate of the Court of Appeals reversing the judgment heretofore rendered in this case filed in vacation is now noted as filed of record, and it is ordered that this case be and it is now reinstated upon the docket.

279 Said Mandate is here copied:

Mandate.

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals:

February 24th, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
JOHN G. HOLLOWAY'S ADM'R, Appellee.

Appeal from a Judgment of the Henderson Circuit Court.

The court being sufficiently advise-, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded, with instructions to grant Appellant a new trial and for further proceedings consistent with the opinion herein.

Which is ordered to be certified to said Court.

A Copy—

Attest:

ROBERT L. GREENE, C. C. A.,
By A. ADDAMS, D. C.

Issued April 1st, 1915.

On April 5th, 1915, the Plaintiff filed in the office of Clerk Henderson Circuit Court a Notice of filing the Mandate of Court of Appeals. Said notice is here copied:

280

Notice.

The defendant, the Louisville and Nashville Railroad Company, will take notice, that the plaintiff John G. Holloway's Adm'r, has filed in the clerk's office of the Henderson Circuit Court, the mandate of the Court of Appeals reversing the judgment of the lower court herein, and that plaintiff will amend his petition according to leave granted by the Court of Appeals and shall ask that the said case be tried at the May, 1915, term of the Henderson Circuit Court.

CLAY AND CLAY,
Attorneys for Plaintiff.

Service of the above notice accepted this April 5th, 1915.
JOHN C. WORSLEY

JOHN C. WORSHAM,
Attorney for Defendant.

At a subsequent day of May, 1915, term of Henderson Circuit Court; Wednesday, May 5th, 1915, the following order was entered in the above styled case. Said order is here copied:

Order.

It is ordered by court that this case be set for trial on the 25th day of present term.

281 At a subsequent day of May 1915 term of Henderson Circuit Court; Friday May 7th 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

Came the plaintiff by attorney and filed second amended petition herein.

Said Second Amended Petition referred to above is here copied:

Second Amended Petition.

The plaintiff, by leave of court amends his original petition herein, and for amendment states:

That the decedent, John G. Holloway, and Myrtle S. Holloway, the person for whose benefit this action was instituted, were married on the — day of — 190— and lived together thereafter as husband and wife, and were so living together as husband and wife at the time of the death of said John G. Holloway; that the said Myrtle S. Holloway at the time of the death of said John G. Holloway had a pecuniary interest in his life and in his estate, and was dependent upon him for maintenance and support; and that by his death she suffered a pecuniary loss of \$50,000.00, the amount claimed in the original petition herein.

282 Wherefore plaintiff prays as in his original petition.

CLAY & CLAY.

Attorneys for Plaintiff.

At a subsequent day of May 1915 term of Henderson Circuit Court; Thursday May 16th 1915 the following order was entered in the above styled case. Said order is here copied:

Came plaintiff by attorney and filed agreement between plaintiff and defendant counsel that on any subsequent trial of above styled case, that the testimony of the witness J. B. Smith as transcribed by the Official Stenographer as contained in the Bill of Exceptions on the first trial of this case may be read as his deposition.

Said agreement referred to above is here copied:

Agreement.

It is hereby agreed that on any subsequent trial of the above styled case, the testimony of the witness J. B. Smith, as transcribed

by the official Stenographer and contained in the Bill of Exceptions on the first trial of this case, may be read as his deposition herein.

CLAY & CLAY,

Attorneys for Plaintiff.

N. P. TAYLOR &

JOHN C. WORSHAM,

Attorneys for Defendant.

283 At a subsequent day of May 1915 term of Henderson Circuit Court; Monday May 31st 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant by attorney and filed its answer to the plaintiff's amended petition herein.

Said answer referred to above is here copied:

Answer to Second Amended Petition.

The defendant, for answer to the second amended petition of plaintiff states that it has not knowledge or information sufficient to form a belief that John G. Holloway and Myrtle S. Holloway were married on the — day of —, 19— or lived together as husband and wife thereafter, or were so living together at the time of the said Holloway's death.

Defendant denies that at the time of the said decedent's death the said Myrtle S. Holloway had a pecuniary interest in his life or estate, or was dependent upon him for maintenance or support; and denies that by his death she suffered a pecuniary loss of \$50,000.00, or any pecuniary loss.

Wherefore defendant prays as in its original answer.

N. P. TAYLOR,

JOHN C. WORSHAM,

Attorneys for Defendant.

284 At a subsequent day of May 1915 term of Henderson Circuit Court; Monday May 31st 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant L. & N. R. R. Co. by attorney and tendered and moved to file an amended answer herein, to the filing of which the plaintiff object- and the court sustained the objection, to which defendant objects and excepts.

Said Amended Answer referred to above is here copied:

Amended Answer.

The defendant, by leave of court, amends its answer, and for amendment states:

(That this court has not jurisdiction of the subject matter of this action for the reason that it is brought under the Federal Employers' Liability Act, being an act of Congress of April 5, 1910; that the cause of action being created by Congress, the enforcement of same can only be had in courts controlled by and applying the rules of the common law as to jury trials; that Article VII, being the seventh Amendment to the Federal Constitution, which defendant pleads and relies on, provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in
285 any court of the United States than according to the rules of the common law"; that by the rules of the common law the verdict of the jury must be the unanimous verdict of twelve men; that under the laws of the State of Kentucky, to-wit, Sec., 2268, Ky. Statutes, it is provided:

"That in all trials of civil actions in the circuit courts, three fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if returned by the entire panel"; and that this court, being controlled by and applying the statutory laws of this Commonwealth in jury trials of common law actions, instead of the rules of the common law, has not jurisdiction of this action.

Wherefore defendant prays that plaintiff's petition be dismissed; that it have judgment for its costs; and for all proper relief.)

N. P. TAYLOR,

JOHN C. WORSHAM,

Attorneys for Defendant.

At a subsequent day of May 1915 term of Henderson Circuit Court; Monday May 31st 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

Parties appeared by attorneys. Announcing ready, came the following jurors to-wit; Charles McCullan, Julius Tillitson, Harry Cheaney, Marion Guish, Joe Butler, Henry Collins, H. J.
286 Mudge, David E. Boswell, Joe Priest, Ben Brisby, Andrew Konsler, and Mayor Tillotson, all of whom were sworn according to law and trial of the case proceeded with. On motion of defendant and by agreement, Miss Annie Lauri Hardesty, Official Stenographer was called and proceeded to take a stenographic report of the evidence herein. At 12 o'clock not having time to complete the trial of the case the jury was admonished by court as by law required, allowed to disperse and directed to be in court at 1:15

o'clock, to which time this case is continued. At 1:15 o'clock parties appeared, by attorney, the jury heretofore empaneled appeared, were called and trial of the case proceeded with. At 4:30 o'clock not having time to complete the trial of the case, the jury was admonished by court as by law required, allowed to disperse and directed to be in court tomorrow morning at 9 o'clock, to which time this case is continued.

At a subsequent day of May 1915, term of Henderson Circuit Court; Tuesday, June 1st, 1915, the following order was entered in the above styled case. Said order is here copied:

Parties appeared by attorney, the jury heretofore empaneled appeared, were called, and trial of the case proceeded with. At 12 o'clock not having time to complete the trial of the case, the jury was admonished by court as by law required, allowed to disperse and directed to be in court at 1:15 o'clock, to which time this case is continued. At 1:15 o'clock parties appeared by attorney, the jury heretofore empaneled appeared, were called and trial of the case proceeded with, having heard the evidence, received instructions of the court, and heard argument of Counsel. At 5:25 o'clock, not having time to submit the case to the jury for consideration, the jury was admonished by court as by law required, allowed to disperse and directed to be in court to-morrow morning at 9 o'clock, to which time this case is continued.

At a subsequent day of May 1915 term of Henderson Circuit Court; Wednesday June 2nd 1915 the following order was entered in the above styled case. Said order is here copied:

Judgment.

Parties appeared by attorney, the jury heretofore empaneled appeared, were called, and the court submitted the case to the jury, the jury retired to their room and presently returned into court the following verdict, viz: We the jury find for the plaintiff in the sum of Twenty five thousand dollars \$25000.00, A. Konsler, Foreman. It is therefore adjudged by the court that the plaintiff John G. Holloway's Admr. recover of the defendant the Louisville & Nashville Railroad Co. the sum of Twenty-five thousand (\$25000.00) dollars with interest from date until paid, and its costs herein expended, for all of which execution may issue.

At a subsequent day of May 1915 term of Henderson Circuit Court; Friday June 4th 1915 the following order was entered in the above styled case. Said order is here copied:

288

Order.

Came the defendant by attorney and filed its reasons and motion for a new trial, and moved the court to set aside the verdict of the

jury, and arrest the judgment herein, and grant it a new trial. Said motion is continued for the present.

Said Motion and Reasons for a new trial referred to above is here copied:

Motion & Reasons for New Trial.

The defendant, Louisville & Nashville Railroad Company, moves the court to set aside the verdict of the jury and the judgment herein, and grant it a new trial for the following reasons, viz:

First. Because the damages awarded the plaintiff by the verdict herein are excessive, and appear to have been given under the influence of passion or prejudice.

Second. Because the court erred to the prejudice of the defendant in giving the jury the instructions marked Nos. 1, 2, 3, 4, 5, 6 and 7, to the giving of which the defendant at the time objected and excepted.

Third. Because the court erred to the prejudice of the defendant in instructing the jury that if all twelve could not agree on a verdict as many as nine might agree and return a verdict, to the giving of which instruction the defendant at the time objected and excepted.

Fourth. Because the court erred to the prejudice of the defendant in refusing to give instructions marked *a*, *b*, *c*, *d* and *e*, offered by the defendant, to which ruling of the court the defendant at the time excepted.

289 Fifth. Because the verdict is not sustained by sufficient evidence.

Sixth. Because the verdict is contrary to law for the reason that the damages assessed exceed the pecuniary loss sustained by the widow of John G. Holloway, deceased, in the death of the said decedent, as will appear from the official stenographer's transcript of evidence, which is referred to and asked to be considered as a part hereof.

Seventh. Because the court erred in admitting incompetent and irrelevant evidence offered by the plaintiff, over the objection of the defendant, as will appear from the official stenographer's transcript of evidence, which is referred to and asked to be considered as a part hereof, and as will appear from the depositions read on the trial of the case, to which ruling of the court the defendant at the time excepted.

Eighth. Because the court erred in refusing to admit competent and relevant evidence offered by the defendant, as will appear
290 from the said transcript of evidence and said depositions, to which rulings of the court the defendant at the time excepted.

Ninth. Because the verdict of the jury and the judgment entered thereon in this case are excessive, and amount to the taking of defendant's property without due process of law, and without compensation, in violation of the Fifth Amendment to the Constitution of the United States, which defendant pleads and relies upon in support—
for a new trial.

Tenth. Because the verdict of the jury and the judgment entered

thereon in this case are excessive and amount to the deprivation of defendant of its property without due process of law, and if sustained would amount to a denial to the defendant of the equal protection of the laws, in violation of the fourteenth Amendment to the Constitution of the United States, which defendant pleads and relies upon in support of its motion for new trial herein.

LOUISVILLE & NASHVILLE RAILROAD CO.,

By N. P. TAYLOR &

JOHN C. WORSHAM, *Attorneys.*

291 At a subsequent day of May 1915 term of Henderson Circuit Court; Saturday June 5th 1915, the following order was entered in the above styled case. Said order is here copied:

Order.

Came Miss Annie Laurie Hardesty, Official Stenographer and filed her account against the Louisville & Nashville Railroad Co. amounting to \$10.00 same is allowed and ordered to be paid by the defendant and taxed as costs.

At a subsequent day of May 1915 term of Henderson Circuit Court; Saturday June 5th 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

This cause coming on to be heard on defendant's motion and reasons for a new trial and the court being advised, overrules said motion, to which ruling of the court, the defendant objects and excepts, and prays an appeal to the Court of Appeals which is granted, and defendant is given until and including the 1st day of next Sept. 1915 term of court to file its Bill of Exceptions, Transcript and carbon copy of the evidence herein.

On July 5th 1915 the same being Rule day in the Henderson Circuit Court, the following order was entered:

292

Order.

Came the defendant by attorney and tendered and moved to file its Bill of Exceptions, Transcript and Carbon copy of the evidence herein. Said motion continued for the present.

At a subsequent day of Sept. 1915 term of Henderson Circuit Court; Monday Sept. 6th 1915 the following order was entered in the above styled case. Said order is here copied:

Order.

Came the defendant L. & N. R. R. Co. by attorney and tendered and moved to file its Bill of Exceptions, Transcript and carbon copy of the evidence herein. Said motion is continued for the present.

At a subsequent day of Sept. 1915 term of Henderson Circuit Court; Friday Sept. 24th 1915, the following order was entered in the above styled case. Said order is here copied:

Order.

The defendant's Bill of Exceptions, Transcript and carbon copy of the evidence herein having heretofore been tendered on Sept. 6 1915, having been examined, approved and signed by the Judge, are now ordered filed and made a part of the record herein.

293 Said Bill of Exceptions referred to above is here copied:

Be it remembered, that on the trial of this case the oral evidence was taken by Miss Annie L. Hardesty, official stenographer of this court, and her transcript of evidence, certified to by her and approved by the Judge of this Court, is made a part of this Bill of exceptions the same as if copied in full herein. Said Bill of Exceptions also contains all objections to testimony, the rulings of the court thereon, and exceptions thereto, and all avowals as to evidence made during the trial. Said Transcript of Evidence, in duplicate, is filed herewith as part hereof and for identification is marked "X".

At the conclusion of plaintiff's oral testimony as shown by said stenographer's Transcript of Evidence, the plaintiff read the depositions of Brovai Williams, W. K. Golson, Samuel F. Arn, W. F. Butts, W. D. Reynolds and J. N. Rollo.

(The Clerk will here copy the foregoing depositions).

The deposition of Brovai Williams referred to above, is copied in this record on page 50.

294 The deposition of W. K. Golson, referred to above is copied in this record on page 80.

The deposition of Samuel F. Arn, referred to above is copied in this record on page 83.

The deposition of W. F. Butts, referred to above is copied in this record on page 99.

The deposition of W. F. Reynolds referred to above is copied in this record on page 118.

The deposition of J. N. Rollo, referred to above, is copied in this record on pages 154.

The defendant then introduced these witnesses who testified orally on its behalf, as shown by the said stenographer's Transcript of Evidence, and at the conclusion of their said testimony the defendant read the depositions of R. C. Gorey, Sr., W. H. Taylor, Jr., R. C. Gorey, Jr., J. E. Lockhart, A. E. Parker, and Samuel F. Arn, which are as follows:

(The Clerk will here copy the said depositions).

295 The deposition of R. C. Gorey, Sr., referred to above is copied in this record on page 170.

The deposition of W. H. Taylor, Jr., referred to above is copied in this record on page 183.

The deposition of R. C. Gorey, Jr., referred to above is copied in this record on page 220.

The deposition of J. E. Lockhart referred to above is copied in this record on page 234.

The deposition of A. E. Parker referred to above is copied in this record on page 242.

The deposition of Samuel E. Arn referred to above is copied in this record on page 141.

The plaintiff, by agreement, then read in rebuttal the testimony as given by the witness J. B. Smith, on the former trial of this case, and also read the deposition of J. O. Gibson, which said evidence and deposition are as follows:

(The Clerk will here copy the evidence of J. B. Smith, taken on the former trial of this case from the stenographer's Transcript of Evidence, and the deposition of J. O. Gibson.)

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Deposition of J. B. Smith.

The Deposition of J. B. Smith referred to above is here copied:

Witness J. B. SMITH being called on behalf of the plaintiff and being first duly sworn testified as follows:

Examined by Mr. Jas. F. Clay:

Q. Where do you reside?

A. Montgomery, Alabama.

Q. How long have you resided there?

A. All of my life.

Q. What business are you engaged in?

A. Transfer business.

Q. Are you acquainted with W. H. Taylor, Jr., a witness in this case?

A. Yes, sir; I am.

Q. How long have you known him?

A. All of his life.

Q. Where has he lived?

A. Montgomery, Alabama.

Q. I will get you to state whether or not you are acquainted with the general reputation of W. H. Taylor, Jr., among his neighbors and acquaintances and those with whom he associates for truth and veracity and general moral character.

A. I am.

Q. Is the reputation good or bad?

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A. Very bad.

Cross-examined by Mr. N. P. Taylor for def't:

Q. What is the population of the city of Montgomery, Alabama?

A. I couldn't tell you at present.

Q. Is it not about 50,000?

A. I expect so.

Q. You have lived there all your life?

A. Yes, sir.

Q. When did you come up here?

A. This morning.

Q. How did you happen to come?

A. I got acquainted with Mr. Holloway in Montgomery.

Q. And came up with him?

A. Yes, sir; on the train.

Q. For the purpose of testifying in this case?

A. Yes, sir.

Q. What is your business?

A. I am in the automobile transfer business.

Q. Ever on the police force?

A. Yes, sir; I just lacked five weeks being on the police force 18 years.

Q. You were also constable?

A. Yes, sir; I worked in the County until they abolished that office.

298 Q. You say you just happened to get acquainted with who?

A. I run a line of rent cars and Mr. Holloway got one to rent and I got acquainted with him on the rent stand.

Q. You came on up here for the purpose of testifying in this case?

A. Yes, sir; he asked me if I would come up here. And he paid my expenses.

The deposition of J. O. Gibson referred to above is copied in this record on page- 258 to 263.

The above was all the testimony offered by either party on the trial of this case. At the conclusion of all the evidence, the defendant moved the Court to give the jury the following instructions numbered *a, b, c, d* and *e*, which motion the Court overruled, to which ruling the defendant at the time excepted and still excepts. Said instructions are in full as follows, viz:

A. The Court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his life time, and had reasonable expectation of receiving

299 from him if he had not been killed. And the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years.

b. The court instructs the jury that they cannot make a verdict agree to the verdict.

c. The Court instructs the jury that they cannot find for the plaintiff in this case unless they shall believe from a preponderance of the evidence that plaintiff has established the issues which the Court has told the jury, in other instructions, it is necessary for them to find in order to return a verdict for plaintiff.

d. The court instructs the jury that if they shall believe from the evidence that flagman Taylor flagged or otherwise signalled Holloway in time to have enabled him to stop his train before the collision, the law is for the defendant, and the jury should so find.

e. The Court instructs the jury that if they shall find for the plaintiff they cannot award damages against the defendant in excess of the sum of \$13,737.60, the pecuniary loss shown to have been sustained by Myrtle S. Holloway, for whose benefit this action is brought, by the death of the defendant, John G. Holloway.

300 The Court, on its own motion, gave the jury the following written instructions, numbered 1, 2, 3, 4, 5, 6, and 7, and in addition orally instructed the jury that if all twelve could not agree on a verdict, as many as nine might agree and return a verdict, but if less than twelve and as many as nine agreed on a verdict those who agreed to it must sign it, to the giving of which written and oral instructions, the defendant at the time objected, but no objection was made or exception taken because said instruction was given orally it being agreed that it might be so given, and its objection being overruled it excepted at the time, and still excepts.

Said written instructions are in full as follows, viz:

1. Gentlemen of the jury, the Court instructs you that it is admitted by the pleadings and must be taken as true that John G. Holloway met his death at the time and place stated as the result of a collision between two trains on the defendant's railroad, and that the said John G. Holloway was at the time in the employ of the defendant as engineer on one of said trains. The Court further instructs you as a matter of law that the defendant Company was at that time engaged in commerce between several of the states, and that the said John G. Holloway was at the time of his death employed in commerce between several of the states.

301 2. The Court further instructs you that it was the duty of the defendant Company, by and through its officers, agents and employees, to give to those in charge of the train upon which the said John G. Holloway was engineer, reasonable warning of the presence of the work-train of the defendant upon its main track, at the time in question, by placing torpedoes on its track, or by flagging or both, or in some other reasonable manner, while such train was at sufficient distance from said work-train as would have enabled those in charge of such moving train to have stopped the same by the exercise of ordinary care in time to have avoided collision with said train; so, therefore, if you shall believe from the evidence that the officers, agents or employees of the defendant failed to give such reasonable warning to the engineer, or other person in charge of the train upon which said Holloway was employed, either by placing upon the track torpedoes, or by flagging for a sufficient distance from said work-train as would have enabled said engineer or other person in

charge of said moving train, by the exercise of ordinary care and precaution, to have stopped the same in time to have avoided said collision, and that as the result of said failure, if any, the collision occurred and said Holloway killed, then in that event you should find for the plaintiff, the measure of recovery if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to-wit: \$50,000.00, but unless you shall so find and believe from the evidence as above required, you shall find for the defendant.

3. The Court further instructs you that even though you may believe from the evidence that the defendant by or through its officers, agents or employees was guilty of the negligence as above defined, if any there was, yet if you shall further believe from the evidence that the deceased, John G. Holloway, was also negligent, in that *is* failed to keep a look-out for signals, if he did so fail, or failed to use ordinary care to stop his train after discovering the work train was on the track, or failed to exercise ordinary care to leave his train and prevent injury to himself, if he did so fail, after discovering the danger, if any, and that but for such contributory negligence, if any, the accident and injury would not have occurred, and his death resulted, yet such contributory negligence, if any, will not bar or prevent recovery by the plaintiff under the same instruction, but in that event you will diminish the damages, if any awarded to plaintiff, in proportion to the amount of negligence attributable to the said John G. Holloway, so that the plaintiff will not recover full damages, but only a proportional part bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both the said Holloway and the defendant."

4. The Court further instructs you that it was the duty of the deceased, John G. Holloway, to use every reasonable effort at his command, after having been warned or signalled of the presence of the work-train upon the track, or after having discovered its presence on the track, to stop said train and prevent said collision and protect himself from danger or death, if it could have been done by the exercise of ordinary care, and the failure on his part to do so, if any, would be contributory negligence as defined in these instructions; but the Court instructs you that if you shall believe from the evidence that the deceased, John G. Holloway, was, through the negligence, if any, of defendant, its officers, agents, or employees, placed in a position of peril where he believed or had reasonable grounds to believe there were open to him two or more possible means of escape, the fact that he adopted one of such means of escape and was killed will not render him guilty of contributory negligence, even though the jury may believe from the evidence that had he adopted some other means of escape he would not have been killed, if the said Holloway at the time believed and had reasonable grounds to believe that the means he adopted were the safest for him, con-

sidering his position and the duty he owed to those upon the train he was operating.

5. The Court further instructs you that if you shall believe from the evidence that the defendant's flagman, Taylor, gave the signals by waving the flag and placing the torpedoes or torpedo required at such place as would have given the deceased engineer, Holloway, by exercising ordinary care, time to stop the train he was running and prevent the collision complained of then in that event you should find for the defendant.

6. The Court further instructs you that if you shall believe from the evidence that at the time the deceased, John G. Holloway, lost his life, he was operating his engine at a rate of speed in excess of the schedule rate of speed permissible for similar engines engaged at similar services at the point where the injury occurred, if he was doing so, and if in doing so he helped to cause or bring about the accident, then in that event you will find that he was guilty of contributory negligence, in which event you will diminish the damages, if any are awarded to plaintiff, in proportion to the amount of negligence attributable to the said John G. Holloway, so that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence both to the said Holloway and to the defendant.

7. The Court further instructs you that by negligence as used in the foregoing instructions is meant the failure to use ordinary care, and that by ordinary care as used in these instructions is meant such care as an ordinarily prudent person would usually exercise under the same or similar circumstances, as proven in this case.

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Given.

J. W. HENSON, *Judge*.

The instructions given and the instructions refused as above set out were all that were offered, given or refused.

Came defendant and tendered this, its Bill of Exceptions with a transcript, in duplicate, of the official stenographic report of the evidence, and, on its motion, said Bill of Exceptions is examined, signed, attested and approved by the Court, and said Transcript of Evidence is examined, signed, attested and approved by the Judge, and it is now ordered that they be filed and be made a part of the record without being spread on the Order Book, and it is now certified that this Bill of Exceptions with said stenographic report of the evidence, contains all the evidence in the case, and it is true and correct in every particular.

J. W. HENSON,
Judge Henderson Circuit Court.

On July 28th, 1915, the defendant L. & N. R. R. Co. executed in the office of the Clerk of Henderson Circuit court its Supersedeas Bond. Said Supersedeas Bond is here copied:

307

Supersedeas Bond.

Henderson Circuit Court.

E. S. HOLLOWAY, Adm'r of the Estate of John G. Holloway, Dec'd,
Who Sues *by* the Use and Benefit of Myrtle Holloway, Widow of
John G. Holloway, Deceased, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD Co., Defendant.

We undertake that the Louisville & Nashville Railroad Co. will pay to *the* E. S. Holloway Adm'r of John G. Holloway's deceased all costs and damages that shall be adjudged against said Louisville and Nashville Railroad Co. on the appeal from the judgment of said Court, rendered June 2nd 1915, for (\$25000.00) Twenty five thousand dollars with interest from date, also that said Louisville & Nashville Railroad Co. will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the Court passing upon said appeal may render or order to be rendered by inferior Court, not exceeding in amount or value the said judgment appealed from; also that said Louisville & Nashville Railroad Co. will satisfy all rents, hire or damage accruing during the pendency of said appeal, upon or to any property of which said E. S. Holloway Adm'r of John C. Holloway dec'd may be kept out of possession by reason of said appeal.

308 Witness our hands, this July 28th, 1915.

LOUISVILLE AND NASHVILLE RAILROAD
COMPANY,By N. POWELL TAYLOR, *Att'y.*

NATIONAL SURETY COMPANY,

By N. POWELL TAYLOR,

Attorney in Fact.

Attest:

R. F. CRAFTON, *C. H. C. C.*By A. HATCHETT, *D. C.*

Upon the execution of Supersedeas Bond. Certificate of Supersedeas and copy was issued. Said Certificate of Supersedeas is here copied:

Certificate of Supersedeas.

STATE OF KENTUCKY,

Clerk's Office of the Henderson Circuit Court:

I do certify that an appeal has been granted from this Court from a judgment obtained by E. S. Holloway Adm'r of John G. Holloway, dec'd against Louisville & Nashville and Railroad Co. for (\$25,000.00) Twenty five thousand dollars in the Henderson Circuit Court at its May Term, 1915, and that a Supersedeas bond has been

executed after the Appeal was granted. Wherefore the appellee and all others are commanded to stay proceedings on the judgment.

Witness my hand as Clerk of said Court this 28th day of July 1915.

R. F. CRAFTON, *Clerk*.
By A. HATCHETT, *D. C.*

309 Sheriff's endorsement on reverse side is here copied:

Executed on the within named E. S. Holloway, by delivering him a true copy, Aug. 3rd, 1915.

P. W. TRIGG, *S. H. C.*,
By GEO. GREEN, *D. S.*

310 STATE OF KENTUCKY,
Henderson County, sct:

I, R. F. Crafton, Clerk of the Henderson Circuit Court, do hereby certify that the 238 pages annexed hereto contain a full, complete and correct transcript of the record, in the action wherein John G. Holloway, Adm'r, is plaintiff and Louisville & Nashville Railroad Company is defendant, in said court as appears of record in *in* my office.

Given under my hand, as Clerk this 11 day of Nov. 1915.

R. F. CRAFTON,
Clerk Henderson Circuit Court.

Fee for making transcript \$80.35.

311 And on the same day, to-wit, December 9th, 1915 the appellant now plaintiff in error filed its Bill of Exceptions, which is as follows:

312 Henderson Circuit Court.

JOHN G. HOLLOWAY'S ADMINISTRATOR, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD CO., Defendant.

Transcript of Evidence.

Clay & Clay, of Counsel for Plaintiff.

John C. Worsham and N. P. Taylor, Counsel for Defendant.

Both parties having announced ready for trial, a jury was empannelled and the trial of the case proceeded with on Monday, May 31st, 1915.

313 Witness E. S. HOLLOWAY, being called on behalf of the plaintiff and being first duly sworn testified as follows:

Examined by Mr. James W. Clay for plaintiff:

Q. Mr. Holloway, you are the father of John G. Holloway?
A. I am.

Q. What official position do you hold in connection with your deceased son's estate?

A. Administrator.

Q. What day was it that Mr. Holloway was killed?

A. Fourteenth day of May, three years ago.

Q. 1912?

A. Yes sir.

Q. At the time of his death, what was Mr. Holloway's age?

A. Thirty-four; in other words he would have been thirty-four the following month.

Q. He was then thirty-three years and eleven months old?

A. Yes sir.

Q. He was killed then in May and would have been thirty-four the following month?

A. In June.

314 Q. Did you as Administrator, after his death, look into and ascertain what estate he owned and where located?

A. I did.

Q. I will get you to state if at that time he had any property in Henderson?

A. He had on deposit in the Farmer's Bank seven hundred and fifty dollars.

Q. That money was paid to you as Administrator of his estate?

A. Yes sir.

Q. Where was Mr. Holloway's home?

A. Henderson, Kentucky.

Q. Where did he live when in Henderson?

A. At my house.

Q. And you say that Henderson was his permanent home?

A. Yes sir.

Q. Was he a member of any church in Henderson?

Objected to by defendant. Sustained.

Q. Was he a member of any church in the city of Henderson?

Objected to by defendant. Sustained. Exception.

By the Court: I don't think it material.

(The plaintiff avows that if the witness were permitted to answer he would say that he was at the time a member of the Methodist Church of Henderson.)

315 Q. Was Mr. Holloway a member of any lodge in Henderson?

Objected to by defendant. Sustained. Exception.

(The plaintiff avows that if the witness were permitted to answer, he would say that he was at the time a member of the Masonic Lodge of Henderson.)

Q. I will ask you where Mr. Holloway voted during the time up to the time of his death?

A. No where else; but he cast his last vote here.

Q. How long before your son's death had you last seen him?

A. My recollection, I had seen him the Christmas before; the first of January or at least the Christmas before that June.

Q. Do you remember when Mr. Holloway first went to work for the railroad? When did he first go to work for the railroad?

A. I don't recollect.

Q. He had been working for the railroad some six, eight, or ten years?

A. Yes sir.

Q. State whether or not during that time he made visits to Henderson, Kentucky, when not working?

A. Yes sir.

Q. How often would he make those visits?

A. Two and three times a year.

Q. Where would he stay on those occasions?

A. At my house.

316 Q. State to the jury what was the state or condition of Mr. Holloway's health all the time preceding his death?

A. It was perfect, sir.

Q. What were his habits in regard to industry and activity?

A. They were good, sir.

Q. Do you remember about what his height was?

A. Five feet, nine or ten inches.

Q. About what was his weight?

A. One hundred and forty five to one hundred and fifty pounds.

Q. What were his habits with regard to sobriety?

A. They were perfect, sir.

Q. Do you know what was his position with the Railroad Co. at the time of his death?

A. Railroad engineer.

Q. Now, at the time of his death, was there any back salary due Mr. Holloway from the railroad that you collected as Administrator?

A. Yes sir.

Q. Covering what period of time?

A. A month and ten days.

317 Q. That is, preceding his death?

A. Yes sir.

Q. For that month and ten days, how much did you collect?

A. The full month of thirty days, I collected two hundred and twenty-one dollars; and the last ten days I collected a hundred and four dollars. That ten days was one-third of a month.

Q. For the month and ten days, what was the total?

A. Three hundred and twenty-five dollars, approximately, and maybe a few cents.

Q. I will get you to state to the jury whether or not you knew Mr. Holloway's wife, prior to the marriage of your son?

A. I did.

Q. How long had you known her?

A. For several years.

Q. What was her occupation at that time?

A. A trained nurse.

Q. What did you say her profession or occupation was?

A. She was a trained nurse.

- Q. I will get you to state whether or not she had any property?
A. None at all; only what she made.
- 318 Q. I will ask—Do you know how long they were married, or about, before his death?
A. Something over four years.
- Q. During that time, what did Mrs. Holloway do for support?
A. Nothing.
- Q. Upon whom was she dependent?
A. Her husband.
- Q. Did she have any other means of support during that time?
A. She did not.
- Q. Since her husband's death, where has Mrs. Holloway lived?
A. At my house.
- Q. Has she any means of support then except her own efforts?
A. She has the income of her house that I invested some money she had derived from life insurance.
- Q. Since his death?
A. Yes sir.
- Q. Did she have any money prior to his death?
A. She did not, sir.
- Q. Has she been working or carrying on her occupation as trained nurse?
A. She has, and is doing it now.

319 Cross-examined by Mr. N. P. Taylor, for defendant:

- Q. I believe, Mr. Holloway, you stated that your son had seven hundred and fifty dollars in the Bank here?
A. Yes sir.
- Q. You ascertained that fact, as Administrator, after his death?
A. Yes sir.
- Q. Did he have any money anywhere else that you discovered?
A. Yes sir; I found that he had a small deposit some five dollars, in Nashville. I think five dollars; and ninety-nine dollars and some cents in Montgomery, Alabama.
- Q. He had no character of property anywhere else?
A. No sir.
- Q. Those sums of money are all the property you learned of as his Administrator?
A. Yes sir.
- Q. Do you know how many years he had been in the employ of the L. & N. as engineer?
A. I do not know exactly, sir.
- Q. About how many?
A. Oh, it was some six or seven years.
- Q. Was he engineer during that time?
A. Yes sir.
- Q. Had he, prior to that time, been in the employ of that company in any other capacity?
A. Yes sir. He started with that Company simply as coal heaver,

320 throwing coal from the car to the engine—the very lowest of positions he could hold; after serving there for a while, he was then promoted to the charge of the oil room; and from there to fireman.

Q. During the time of his married life, he made his home here?

A. Yes sir; he was on visits here during that time. *

Q. His wife, during that time, remained here?

A. No sir.

Q. For what length of time did she live here?

A. Different periods.

Q. Where was she living during their marriage?

A. Part of the time in Earlington and part in Nashville, and, at the time of his death, at Montgomery.

Q. He was making that his home so far as you know?

A. He was living there.

Q. I believe they had no children?

A. No sir.

Q. Was he keeping house at Montgomery?

A. He was, sir.

Redirect examined by Mr. Jas. W. Clay for plaintiff.

Q. These various places they lived, at Earlington, Nashville and Montgomery, were they permanent or temporary?

321 A. It seemed like temporary.

Q. He would live closest to the point he was making work?

A. Yes sir.

Q. But Henderson was his permanent home?

A. Yes sir; always considered this as his home.

Q. Now you mentioned several promotions; from heaver to fireman; I will ask you if he was promoted to engineer?

A. He was transferred from this division to the Southern division and when first he went there he was put on what they call "Second Pool." At the time of his death, he was promoted to the "First Pool."

Q. You mean at the time or prior?

A. Prior to the time.

Q. So, at the time of his death he was an engineer of the First Pool?

A. Yes sir; he was called on that run. John's life had been a gradual promotion from the time he was connected with the road.

Recross-examined by Mr. N. P. Taylor for defendant:

Q. For what length of time had he been an engineer of the First Pool at the time of his death?

A. I don't know, Mr. Powell, I don't know, sir.

322 Witness Mrs. JOHN G. HOLLOWAY was then called on behalf of plaintiff, and being first duly sworn, testified as follows:

Examined by Mr. Jas. W. Clay, for plaintiff:

Q. Mrs. Holloway, you are the widow of John G. Holloway?

A. Yes sir.

Q. State to the jury how long you had been married to Mr. Holloway at the time of his death?

A. About four and a half years.

Q. What was your profession, at the time of your marriage?

A. Trained nurse.

Q. During the four years or more of your married life, did you have any income or means of support of your own?

A. No sir.

Q. Upon whom, or upon what were you dependent for support during that time?

A. Mr. Holloway.

Q. You mean Mr. John G. Holloway, your husband?

A. Yes sir

Q. During the time from your marriage up to the time of his death, state to the jury whether you and he lived together continuously as man and wife?

A. Yes sir.

Q. At the time of Mr. Holloway's death, did you have any income or means of support other than your husband?

A. I did not.

323 Q. What were Mr. Holloway's habits in regard to sobriety and industry?

A. Good as could be.

Q. Was he a man that ran around, or stayed at home?

A. Not at all.

Q. Which do you mean?

A. He did not run around.

Q. When not employed, where was he to be found, usually?

A. At home.

Q. During the time of your married life and while Mr. Holloway was working for the L. & N. what did he do with his money?

A. Gave it to me.

Q. Bring his salary checks home and give them to you?

A. Always.

Q. What was he earning at the time of his death?

A. I should say over two hundred dollars a month.

Q. Something over two hundred dollars?

A. Yes sir.

Q. At the time of his death Mrs. Holloway, how long had it been since he was promoted from the branch line to the main line?

A. I think about four months. I am not sure.

324 Q. Then he had been running on the main line over four months?

A. Yes sir.

Q. Prior to that time, he was on the branch line?

A. I think from the 26th of January to the 14th of May.

Q. Was his pay increased when he was promoted from the branch line to the main line?

A. Yes sir.

Q. Did you see your husband the day or the day before he was killed when he set out to make his run?

A. I think he left on Friday; no, Saturday afternoon; a little after noon. It was on Saturday and it was on Tuesday afternoon he was killed.

Q. Do you know what kind of hat Mr. Holloway wore when performing his duties?

A. He took with him a dark blue soft hat and on his run he usually wore a little black silk cap.

Q. Do you know why he used the cap on his run?

Objected to by defendant. Sustained.

Cross-examined by Mr. N. P. Taylor, for defendant:

Q. During your married life with Mr. Holloway, did you keep house?

A. Part of the time.

Q. For what length of time prior to his death had you lived in Montgomery, Alabama?

325 A. Since the 26th of January.

Q. Of the year he was killed?

A. Yes.

Q. Prior to that time, where did you live?

A. In Georgetown, Alabama, boarded there; light house keeping in Earlington, boarded in Nashville and in Elkton.

Q. You said he would turn over to you his pay checks; would he bring home every one of his checks and give it to you?

A. They were not paid in checks.

Q. How?

A. In currency.

Q. And he turned over to you, each month, the entire sum he received?

A. Yes, sir.

Q. And you would put that money in bank and spend it for living expenses as you needed it?

A. Yes.

Q. What would you say the cost of your living expenses amounted to per month?

A. I don't know whether I could give a very good idea of it.

Q. About how much would it be? When you boarded, how much did you pay board?

A. Different prices.

Q. How much at Earlington?

A. We kept house at Earlington.

326 Q. You boarded in Nashville?

A. Yes, sir.

Q. How much there?

A. I paid twenty-five dollars.

Q. He was away from home a great part of the time?

A. Yes sir.

Q. So when you boarded and paid twenty-five dollars, you had no other expenses except your clothes?

A. It is owing to what you call expenses; no absolute expense.

Q. How much did the board and other necessary living expenses amount to per month while in Nashville?

A. I have not the slightest idea.

Q. Can you estimate it, if you know what he got a month and how much it cost you—

A. I don't know how much he got each month, because it was not a regular salary.

Q. He did not get two hundred dollars every month?

A. Yes, sir—no sir.

Q. What would it be?

A. Sometimes fifty and sometimes one hundred and fifty at that time.

Q. That was how many years before his death?

327 A. Four and a half years.

Q. During the four years preceding his death, about how much would these monthly payments amount to he received?

A. I should say seventy-five or one hundred dollars.

Q. Seventy-five some months and others one hundred, and other months how much?

A. Sometimes more.

By the Court:

Q. About what would the average be, as near as you could get at it?

A. Possibly a hundred dollars; I don't know.

Q. He was not running regular—when he was not running regularly, he would be home waiting for another run?

A. Yes, sir.

Q. You would think during the four years preceding his death it would average one hundred dollars a month?

A. Yes, sir.

Mr. N. P. Taylor (cont'g):

Q. You would put that in bank every month?

A. Usually.

Q. He would not retain any of it or take any for his personal expenses?

328 A. Certainly he would.

Q. About how much per month would he take?

A. I don't know.

Q. You would say twenty-five or thirty dollars?

A. Yes sir; about that much.

Q. When he was away he would have to eat and pay his expenses?

A. Yes, sir.

Q. He was at that time making runs of considerable distances and be out a week at a time?

A. Yes, sir.

Q. And he would buy his own clothes and expenses while away from home?

A. Yes, sir.

Q. You kept account of the deposits in bank and the money you spent?

A. Yes, sir.

Q. You checked against this account and used it for living expenses and as you desired to use it, from time to time.

A. Yes, sir.

Q. Do you know how much money was in the bank belonging to him and subject to your check at the time of his death?

A. I believe we had about seven hundred and fifty dollars here.

Q. That was in what bank here?

A. Farmers Bank.

329 Q. Had you put any money in any other bank?

A. Yes sir; Montgomery.

Q. How much?

A. About a hundred dollars.

Q. Did you have any other money at that time?

A. Five dollars in Nashville.

Q. That was all the money Mr. Holloway owned and had at the time of his death?

A. Yes, sir.

Q. Did he own any other property, real estate, stocks or bonds, or any other property other than you mentioned?

A. No, sir.

Q. And the other money he earned was for living expenses and except these sums in the Farmers Bank in Henderson, seven hundred and fifty dollars and something like a hundred in Montgomery and five dollars on deposit in Nashville?

A. Yes, sir.

By the Court:

Q. This seven hundred and some odd dollars on deposit here in Henderson spoken of by you—was that money you had deposited yourself to his credit?

A. Yes, sir.

Mr. Taylor (cont'g):

Q. That was money that Mr. Holloway had turned over to you out of his wages from the L. & N.?

330 A. Yes, sir.

Q. None of that was your money?

A. No, sir.

Q. All of it was given to you by him to be deposited in bank subject to his credit?

A. Yes, sir.

Q. At what place was it, Mrs. Holloway, that you did light house-keeping?

A. At Earlington and Montgomery.

Q. What would you say your expenses amounted to at those places per month?

A. I should say fifty dollars; just for actual expense.

Q. Now, that included your clothes and living of every sort?

A. No, sir.

Q. What would that include?

A. The rent, lights and grocery bill.

Q. What would your expenses be outside of that at Earlington and Nashville?

A. Possibly seventy-five dollars. I cannot make a very good estimate about it, because I have not thought it over.

Q. When you boarded you paid twenty-five dollars a
331 month; what would your personal expenses be outside of that?

A. Just for clothing and incidentals.

Q. What would that amount to a month?

A. Fifteen dollars for myself.

Q. Now, your personal expenses—I mean by that incidental expenses and for clothing at the other places where you were would amount to about the same, would it?

A. Yes, sir.

Q. But it cost you some more when you did light housekeeping than when boarding?

A. I don't know that it did.

Q. You paid twenty-five dollars a month board; did it cost you any more when light house keeping?

A. Well, you see there were two to keep house for when house-keeping.

Q. That included his expenses as well?

A. Yes, sir.

Re-examined by Mr. Jas. W. Clay, for plaintiff.

Q. This seven hundred and fifty dollars that you deposited in Bank, was that subject to your check as well as Mr. Holloway's?

A. Yes, sir.

332 Q. Either of you had the privilege of checking on that account?

A. Yes, sir.

Q. He had the same right to check on it that you had?

A. Yes, sir.

Q. How was Mr. Holloway's employment with regard to regularity after the main road, as compared with the branch road?

A. He had regular employment both times.

Q. Was he out more on the main or the branch road?

A. Out on the main road; he was away from home more.

Q. During the four months he was on the main road, you say his salary averaged about two hundred dollars a month?

A. I did not say that.

Q. What was it you said about the two hundred dollars a month?

A. (No answer.)

Q. At the time of his death and prior to the time, immediately preceding his death and after he was running on the main road, what would you say his salary averaged?

A. After he was on the main road he was on the work train and his salary was one hundred and fifty dollars and after the regular road, it was over two hundred dollars.

333 Q. And at the time of his death, he was on the regular run?

A. Yes sir.

By the Court:

Q. He was only paid when actually out on the run?

A. Yes sir.

Q. Just paid for what he actually did?

A. Yes sir.

Recross-examined by Mr. N. P. Taylor, for defendant:

Q. While his salary was that, you don't mean to tell the jury that each month he would give you two hundred dollars in currency?

A. Of course not. He had to rest.

Q. What would those payments he turned over to you amount to?

A. Over two hundred dollars.

Q. It was over two hundred dollars each month after the regular run; thirty days?

A. Yes sir.

Q. He was working continuously during those four months?

A. Yes sir; as a railroad man would work.

Q. But was only paid two hundred dollars for actual time he worked?

A. Yes, sir.

334 Q. Was he not at home during that time?

A. Yes sir.

Q. He would not be paid during that time?

A. Yes sir.

Q. During that time would he be at home during the month?

A. I should say a third of the time.

Q. Then if he received two hundred dollars a month would that reduce the sum he received during the thirty days?

A. No sir.

Q. He actually got two hundred dollars a month during the time he was in the First Pool, or four month- prior to his death?

A. Yes sir, during his last run.

Re-examined by Mr. Jas. W. Clay, for plaintiff:

Q. Mrs. Holloway, at the time of Mr. Holloway's death, what was your age?

A. Thirty-one.

Q. His age, I believe, was not quite thirty-four?

A. Yes sir.

At this point, plaintiff read the deposition of Brovia Williams, which will be copied by the Clerk and made a part of the record.

335 Witness BARRETT HOLLOWAY, was then called on behalf of plaintiff, and being first duly sworn, testified as follows:

Examined by Mr. Jas. W. Clay, for plaintiff:

Q. Mr. Holloway, you are a brother of John G. Holloway?

A. Yes sir.

Q. Where do you live?

A. In the city, 614 Center.

Q. What is your occupation or employment?

A. Chief Clerk, local office here.

Q. What Company?

A. L. & N.

Q. How long have you been connected with the railroad?

A. Thirteen or fourteen years.

Q. I will ask you whether or not you know the Book or Rules of the L. & N. for its operation.

A. Yes sir.

Q. Is the book you now have such a book of rules?

A. Yes sir.

Q. In what form is that book?

A. The general form used with the new system.

Q. The book you have is marked "L. & N. Rules of Operating Department No. 18725?"

A. Yes sir.

336 Q. Over what part of the system is that Book of Rules in effect?

A. It governs the entire system.

Q. I will get you to state, to examine the fly leaf and say when it went effect?

A. May 19th, 1909.

Q. How long did it remain in effect?

A. It is still.

Q. Was it then in effect on May 14th, 1912, when your brother was killed?

A. Yes, it was.

Q. I will get you to examine Rule 99 of that and read it to the jury?

A. Witness reads: "When a train stops or is delayed, under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals to stop any train moving in the same direction. At a point 50 rail lengths, or 1500 feet, from the rear of his train, he must place one torpedo on the rail; he must then continue to go back at least 100 rail lengths, or 3000 feet from the rear of his train, and place two torpedoes on the rail, 30 feet, or one rail length apart, when he may return to a point 70 rail lengths or 2100 feet from the rear of his train; and he must remain there until recalled by the whistle of his engine; but if a passenger train is due

337

within ten minutes, or if an approaching train is within sight or hearing he must remain until it arrives. If the view is obstructed or if an approaching train is within sight or hearing he must remain until it arrives. If the view is obstructed, or if on descending grade, he must go as much further as may be necessary to reach a point where he is absolutely sure that he can be seen by the expected train at a sufficient distance in which to stop. When he comes in he must remove the torpedo nearest to his train; but the two torpedoes must be left on the rail as a caution signal, to any following train. When protecting at night, the flagman must, the last thing before being recalled, place a lighted red fuse upright between the rails at the point where the one torpedo was removed.

"An exception may be made only under the following conditions: If on level, or ascending grade and on a straight line where there is a clear and unobstructed view of the track for at least one mile, the flagman must go back at least 30 rail lengths, or 900 feet, by day, and not less than 70 rail lengths or 2100 feet by night. At a point 20 rail lengths or 600 feet from the rear of his train 338 he must place one torpedo on the rail, and when he has reached the prescribed distance he must place two torpedoes on the rail 30 feet, or one rail length apart, when he may return to the point where he placed the first torpedo being governed in other respects by the requirements of the first paragraph of this rule.

"The front of a train must be protected in the same way by the front brakeman; if he is unable to go, the fireman must be sent in his place."

Q. I will ask you also to turn to Rule 97 E and read it.

A. Witness reads: "When a work extra is working under protection of signals and the flagman is instructed to notify approaching trains to look out for such work extra at a certain point or points, the conductor of the work extra must write and sign two copies of instructions for each train signaled; the flagman of the work extra must deliver one copy each to the engineman and conductor of all trains signaled. Copies of instructions should be made at one writing by use of carbon paper. As an additional precaution in all such cases, the work extra when standing at a place where it cannot be plainly seen by an approaching train must be protected by a second flagman."

339 Q. Mr. Holloway I will ask you whether or not your employment with the Railroad Company during the past twelve or thirteen years has taken you about moving trains to and fro on the track?

A. Yes sir.

Q. Explain to the jury, if you know, how a torpedo is attached and exploded.

A. It is a little larger than a dollar and has two prongs over the top of the rail fastening it.

Q. It is fastened by means of these brass fasteners so as to hold it securely on top of the rail and the wheels of the engine run over the top of it?

A. Yes sir, and cause it to explode.

Q. Have you had any experience in which you noticed how far one of those torpedoes can be heard?

Objection by defendant. Sustained. Exception.

By the Court:

Q. What sort of a report does it give?

A. It is louder than a No. 10 Gage shot gun.

Q. About the same noise in explosion as a No. 10 shot gun when you fire it?

A. Yes sir.

Q. What was the condition of health of John G. Holloway
340 at the time of his death?

A. Perfect condition.

Q. What were his habits with regard to sobriety and industry?

A. Sober.

Q. When a torpedo is placed on a track and run over and exploded by the wheels of the engine, does the engineer give any signal?

A. It is always answered.

Q. What signal?

A. That depends on how——

Q. If it — one?

A. It is one time provided he had run far.

Q. If two?

A. One long, two short and one long blast.

Q. That signal from the engineer direct to the flagman?

A. Yes.

Q. Now, can those torpedoes be run over without exploding?

A. I don't think so. If in any kind of shape at all.

Q. When the torpedo is in perfect shape, it cannot be run over by the wheels of the train without exploding?

A. No.

Q. Who furnishes those torpedoes?

A. The railroad company.

341 Q. Mr. Holloway, I failed to ask you about Rule 97 D.

In the same book of Rules as those just mentioned, I will ask you if there is such a rule as 97 D. there?

A. Yes sir, there is. Witness reads as follows: "When the weather is clear, work extras may occupy the main track against delayed second and inferior class trains, protecting themselves as prescribed by Rule 99. Trainmen of such delayed trains must be on the lookout for signals of work extras."

At this point the deposition of W. D. Reynolds was read by the plaintiff, and will be copied by the clerk and made part of the record.

It is here admitted of record that Pensacola is in the state of Florida, Fort Deposit, Calhoun, Montgomery and Birmingham are in the state of Alabama, Cincinnati is in the state of Ohio and Louisville is in the state of Kentucky.

At this point, the deposition of W. F. Butts was read by the plaintiff, and will be copied by the Clerk and made part of the record.

342 Witness MAYO HOLLOWAY was then called on behalf of plaintiff, and being first duly sworn, testified as follows:

Examined by Mr. Jas. W. Clay for plaintiff:

Q. Mr. Holloway, where do you live?

A. Birmingham.

Q. I will get you to state first whether or not you are the brother of John G. Holloway.

A. I am.

Q. State to the jury whether or not you were at the scene of the collision which occurred on May 14th, 1912.

A. The following afternoon.

Q. How long after your brother was killed?

A. I got down there about two o'clock in the afternoon. I don't know just what time it occurred.

Q. Did you make any examination of the track at the scene of the collision with a view of determining the point where the collision took place?

A. Yes sir.

Q. I will get you to state whether or not you have been there since and whether or not you made any measurements?

A. Yes sir; I was there once afterward and measured.

343 Q. Do you remember how long after the accident it was you were there to make those measurements?

A. I cannot say just how long it was; it was just a few days before the case came to trial the last time.

Q. That was June 1913, was it?

A. Yes sir.

Q. Then it was the latter part of May or first of June 1913 that you were there?

A. Yes sir.

Q. State to the jury what was the distance from the place from where a train coming around the curve should see the work train?

A. Standing on the ground and seeing the train going around the curve, gauging it from a tree and having a man measure it, it was about four hundred feet.

Q. Then it was about four hundred feet to where you saw signs of the collision to a tree.

A. Yes sir, the last I could see there was no train going north but two going south. I did not get to measure it going north.

Q. But you stood there while the train was going south?

A. Yes sir, two of them.

Q. And those trains disappeared around the curve in what distance?

A. Four hundred feet.

344 Q. After it got four hundred feet you could not see it at all from the track?

A. No sir.

Q. Taking that curve into consideration and its location, a train coming around the curve approaching the work train, could it be seen by the engineer or fireman?

A. The fireman—the embankment was on the engineer's side; the right hand side coming north is a bluff; and for that reason the fireman from his position could see it good, and also from being on the outside of the bluff could see it. It would put the engineer on the inside of the curve next to the embankment.

Cross-examined by Mr. N. P. Taylor for defendant:

Q. You stood, as I understand you, Mr. Holloway, at a point, in your own mind, *was* about where the work train was and waited for the south-bound and noted how far you could see it?

A. Yes sir.

Q. You were standing where the work train stood, and looking at a train going from you?

A. Yes sir.

Q. And standing where the work train was and noting a train where it disappeared?

A. Yes sir.

Q. That is the way you arrived at this distance?

345 A. Yes sir.

At this point, the deposition of Samuel F. Arn and G. N. Rollo were read by the plaintiff and will be copied by the clerk and made part of the record.

At this point, the plaintiff offered to and did read the life tables, showing the expectation of life, according to Table No. 2, Dr. Wigglesworth's Table of Mortality, as found in the 1915 Kentucky Statutes, Appendix 2444, being a table showing the expectation of life of the deceased according to Dr. Wigglesworth's table, at the age of thirty-three, the expectation is twenty-nine and two-one-hundredths years, and at the age of thirty-four the expectation is twenty-eight and sixty-two one-hundredths, according to that table.

At the same time, the plaintiff read the same table showing the expectation of Mrs. Holloway the widow, whose age was given as thirty-one in her testimony, to be twenty-nine and eighty-three one-hundredths years; at thirty-two it is twenty-nine and forty-three one hundredths years.

At this point, plaintiff read the deposition of W. K. Golson, which will be copied by the clerk and made part of the record.

346 Plaintiff rests.

The defendant first read the depositions of R. C. Gorey, W. H. Taylor, Jr., R. C. Gorey, Jr., J. E. Lockhart, and A. E. Parker, which will be copied by the clerk and made part of the record.

Witness T. H. MIZELL was then called on behalf of defendant and being first duly sworn testifies as follows:

Examined by Mr. John C. Worsham for defendant:

Q. What employment are you engaged in, Mr. Mizell?

A. Master of Trains of the L. & N. Road, M. & M. Division.

Q. How long?

A. Twenty years the nineteenth of this month.

Q. Is that the division on which Mr. Holloway was running at the time he lost his life?

A. It is.

Q. What was the schedule for running such trains as Mr. Holloway was running at the time the accident occurred between Calhoun and Fort Deposit? What was the maximum speed?

A. On all trains of that kind was thirty-five miles an hour.

347 Q. What was the minimum rate?

A. There is no special minimum rate. I suppose about eighteen or twenty miles an hour, we give the time between those stations to cover both south and north.

Q. But the maximum was?

A. Thirty-five miles an hour the greatest speed allowed to take. South goes up-hill and north goes down hill.

Q. I have reference to the trains north bound?

A. Yes sir.

Q. Have you a schedule of time of operation of trains over the M. & M. Division between Fort Deposit and Calhoun on May 14, 1912?

A. Yes sir, I have.

At this point the defendant offered in evidence the above mentioned schedule, to the introduction of which the plaintiff objected, the court overruled the objection, to which the plaintiff excepted.

(Here follows time table, marked pp. 347½, 347½a, 347½b, 347½c, 347½d, 347½e, 347½f, and 347½g.)

No.

B. M. S.

LOUISVILLE &

o. 96

T

SUNDAY,

FOR THE GOVERNMENT

CEN

. STARKS.

GENERAL MANAGER

LE & NASHVILLE RAILROAD COMPANY.

MOBILE AND MONTGOMERY DIVISION.

TIME TABLE.

No. 96

TAKES EFFECT

AY, APRIL 7, 1912, AT 12:01 A. M.

RNMENT AND INFORMATION OF EMPLOYES ONLY.

CENTRAL TIME, STANDARD.

C. B. PHELPS,

SUPT. TRANSPORTATION.

J. I. McKINNEY,

SUPERINTENDENT.

34 7 1/2

Trains must not exceed six miles per hour through M. & M. yard, Montgomery, and Commerce Street, Mobile.

All trains and engines entering south bound track at Theatre Street just south of the passenger station fence, Mobile, must clear all north bound N. O. & M. Division passenger trains.

In using joint track between south end of South & North and north end of M. & M. yards, across the trestle north of Union Station at Montgomery, you must protect your trains against South & North passenger trains; and before enginemen take their engines to and from the roundhouse they must ascertain whether or not over-due South & North passenger trains have arrived.

YARD LIMITS.

Yard Limits—Montgomery yard, from yard board 200 feet north of Hayneville crossing. Flomaton yard, from yard board north of Escambia Junction, to yard board south of south switch. Mobile yard limits to north end of Chickasaw Bogue Bridge.

DRAWBRIDGE SIGNALS AND RULES.

Enginemen will, at all times, when approaching semaphore signal at drawbridges give four short blasts of the whistle, having train under control. Change of the semaphore signal from stop to proceed, made in view of the engineman, indicates that the drawbridge is in position for the passage of train. In case of failure of operation of signal as indicated herein, enginemen must be governed by Rule 27, and must know that the drawbridge is in proper position before proceeding.

Draw tenders must display the proper signals, as provided in the foregoing rules and must not attempt to change the signal, from stop to proceed, until they know that the Enginemen can plainly see the change made. Draw tenders must report to the Superintendent any violation of these rules.

Trains must not exceed speed of 6 miles per hour when passing over drawbridges.

M. & M. DIVISION.

Nos. 1, 2, 3, 4, 5, 6, 37 and 38 are superior to other first class trains. Other first class trains will clear the time of Nos. 1, 2, 3, 4, 5, 6, 37 and 38 five minutes when meeting, and ten minutes when running ahead.

Other second class trains will let Nos. 71, 72, 73 74, 75 and 78 pass without delay.

Nos. 21, 22, 25 and 26 will let other second class trains pass without delay.

No. 1 will stop on signal at Atmore to let off passengers from P. D. and Southern Alabama.

Nos. 7 and 8 will stop on signal at Morriston, Carney and Dolives.

Nos. 5 and 6 will stop on signal at Herrington and Carney.

No. 5 will stop on signal at Hurricane for passengers for points south of Mobile.

No. 6 will stop on signal at Hurricane for passengers for points north of Flomaton.

No. 5 will take siding at McGehees for No. 2, at Perdido for No. 6, and at Nene-noosha for No. 4.

Nos. 37 and 38 will stop on signal at Greenville, Georgiana, Evergreen, Brewton and Bay Minette for passengers from and to points east of Montgomery via W. of Ala. Ry.

ALA

No's 27 and 28
ery, and Eleanor.

No. 28 will
nection from O. of O.

Nos. 31 and 32

No's 53 and 54
Graceville.

No's 53 and 54
and Eleanor.

Nos. 27 and 28
When necessary to
time of Nos. 27 and 28

Nos. 63, 64, 65
to terminals again

A. & F. Division
in boxes provided
trains, at Duvall.

All A. and F. Division
Duvall.

Nos. 51 and 52
Other second class

Nos. 40, 41, 42

DR. J. I. GASTON, Montgomery, Ala.

DR. ROBERT GOLDTHWAITE, Asst., Montgomery, Ala.

DR. J. A. KENDRICK, Greenville, Ala.

DR. J. C. WATSON, Georgiana, Ala.

T. H. MIZELL,

Master of Trains
MONTGOMERY ALA.

J. P. BURTON,

Assistant Master of Trains
GEORGIANA, ALA.

SPECIAL INSTRUCTIONS.

ALABAMA & FLORIDA RAILROAD.

Nos. 27 and 28 will stop on signal at Shreve, Rumph, Babbie, Estothel, Lowery, and Eleanor.

No. 28 will wait at C. of G. R. R. crossing at Samson until 5:56 a. m. for connection from C. of G. No. 14.

Nos. 31 and 32 will stop on signal at Onycha.

Nos. 53 and 54 will have a coach and do local passenger work between Opp and Graceville.

Nos. 53 and 54 will stop on signal at Estothel, Lowery, Lytle, Spring Creek, and Eleanor.

Nos. 37 and 28 are superior to Nos. 63, 64, 65 and 66 between Opp and Duvall. When necessary for Nos. 63, 64, 65 and 66 to move between Duvall and Opp on the line of Nos. 27 and 28, they will proceed under protection.

Nos. 63, 64, 65 and 66 on the Florida Branch are superior in either direction to terminals against each other.

A. & F. Division trains will leave a register card, Form 92, properly filled out in boxes provided for that purpose, at River Falls and Noma, and Florida Branch trains, at Duvall.

All A. and F. Division trains except No's 27 and 28 will leave register card at Duvall.

Nos. 51 and 52 will let other second class trains pass without delay.

Other second class trains will let Nos. 53 and 54 pass without delay.

B. M. & F. M.

Nos. 40, 41, 42 and 43 will stop on signal at Elkhart.

LIST OF SURGEONS

DR. E. L. STALLWORTH, Evergreen, Ala.
DR. RUSSELL A. SMITH, Brewton, Ala.
DR. W. L. ABERNETHY, Flomaton, Ala.

F. YOUNG,

Chief Dispatcher Between Montgomery and Flomaton, a
MONTGOMERY

WATER STATIONS.

M. & M. DIVISION.

Letchatchie tank at station. Pigeon Creek tank, one and a half miles south of Fort Deposit. Greenville tank, at station. Garland tank, at station. Castleberry tank, at station. Flomaton tank, at station. Dyas Creek tank, at station. Hurricane tank, at station.

Greenville and Flomaton tanks are regular stops for first class trains, and all water stations are regular stops for second and inferior class trains.

A. & F. DIVISION.

McKenzie tank, at station. River Falls tank, one mile south of station. Foley tank, at station. Pera tank, at station. Geneva tank, at station. Wright's Creek tank, one mile south of Noma. Green Bay tank, one mile south of station. Florala tank, $\frac{1}{4}$ mile south of station.

All water stations are regular stops for all trains.

WATER STATIONS.

BAY MINETTE & FORT MORGAN R. R.

At Ward's Springs, $8\frac{1}{4}$ miles South of Bay Minette

At Ard's Springs, $28\frac{1}{4}$ miles South of Bay Minette.

All water stations are regular stops for all trains.

LOCATION OF "Y'S" ON ALABAMA & FLORIDA R. R.

AND

FLORALA BRANCH.

Georgiana, River Falls, Duvall, Florala and Graceville. "Y's" must be left clear at all times.

LOCATION OF Y'S ON BAY MINETTE & FORT MORGAN R. R.

Bay Minette and Foley.—"Y's" must be left clear at all times.

DR. JOS. HALL, Bay Minette, Ala.

DR. H. T. INGE, Mobile, Ala.

DR. L. E. BROUGHTON, Andalusia, Ala.

DR. A. R. CHAPMAN, Geneva, Ala.

T. J. FARRIS,

Chief Dispatcher Between Flomaton and Mobile.

FLOMATON, ALA.

Flomaton, Ala. & Fla. R. R.
MONTGOMERY, ALA.

Let. Sta. for North

34 1 1/2 R

SOUTH BOUND.

SECOND CL.

	19	75	15	13
	Freight	Fast Freight	Freight.	Freight.
	Daily	Daily	Daily.	Daily.
	10.15 PM	8.15 PM	6.00 PM	12.45 PM
	10.32	8.35	6.19	1.02
	10.45	8.50 74	6.32	1.14
	11.01	9.08	6.47	1.32
	11.15	9.15	7.05	1.46
	11.35 PM	9.30	7.30 74	2.05
	12.10 AM	10.00	8.00	2.50
	12.31 78	10.15	8.15	3.05
	12.39	10.24	8.25	3.12
	12.52 74	10.35	8.38	3.25
	1.15	10.47	8.56	3.42
	1.26	10.55	9.08	3.51
	1.48	11.05 79	9.20	4.01
	2.00 AM	11.12	9.30	4.17
		11.19	9.42	4.30
		11.30 PM 74	10.08 3-19	4.53
		12.02 AM 37	10.33	5.15
		12.22	10.52 74	5.40
		12.38	11.12	6.00
		12.54	11.32	6.20
		1.10	11.56 PM	6.40
		1.30	12.16 AM	7.05
		1.47	12.57 37	7.30
		1.57	1.30	7.50
		2.07 79	1.55 78	8.15
		2.16	2.02	8.30
		2.28 AM 38	2.10 AM	9.00 PM
		2.45 AM	2.28 AM 38	
		3.00 78	2.33	9.15
		3.20	2.46 78	9.30
		3.36 2	2.55	9.42
		3.55	3.05	9.55
		4.10	3.21 2	10.10
		4.25	3.36	10.23
		4.45	3.49	10.36
		4.58	4.03	10.47
		5.12	4.20	11.00
		5.29	4.40	11.24
		5.40 72	4.50	11.36 PM
		6.00	5.22 72	12.05 AM
		6.23 28	6.10 28	12.33
		6.55 AM	6.30 AM	1.15 AM
	Daily	Daily.	Daily.	Daily.
	19	75	15	13

Regular south-bound train

3/1/20
2/1/20

BETWEEN

D CLASS.						FIRST		
13	73	71	21	17	25	37	3	27
Freight.	Fast Freight.	Fast Freight.	Local Freight.	Freight.	Local Freight.	New York and New Orleans Limited.	Fast Line.	Gracerville Accom.
Daily.	Daily.	Daily.	Daily Ex. Sunday.	Daily.	Daily Ex. Sunday.	Daily.	Daily.	Daily.
4:45 PM	11:32 AM	6:30 AM 20	4:20 AM	3:30 AM		10:05 PM	8:05 PM	8:15 PM
5:02	11:52 AM	6:55 78	4:40	3:52		10:16	8:15	3:28
5:14	12:03 PM	7:10	5:00	4:04		10:24	8:23	3:31
5:22 72	12:20	7:25 2	5:24 20-38	4:20		10:33	8:33 14	3:42
5:46	12:35	7:42	6:15 78	4:40 20		10:41	8:41	3:51
6:05	1:00 72	8:09 6	7:02 2	5:07 38		10:51	8:51	4:03
6:50 22	1:22	8:47 10	7:20	5:43 78		11:01	9:03	4:17
7:05	1:37	9:05	7:40	6:02		11:09	9:13	4:26
7:12	1:45 22	9:18	7:48 18	6:12		11:13	9:18	4:31
7:25	1:57	9:40 28	8:02	6:30 2		11:20	9:25	4:41
7:42 8	2:04	9:50	8:25	6:50		11:31 78	9:36	4:55
7:51	2:17	9:56	8:36	7:05 18		11:35	9:41	5:00
8:01	2:27	10:04	9:04 5 9:17 28	7:18		11:40	9:48	5:07
8:17 4	2:35	10:11 22	9:45 22	7:29		11:45	9:53	5:15 PM
8:30	2:41	10:19	10:05	7:40		11:49 74	10:00	
8:53 14	3:00 8	10:33 21-72	10:33 71-72	7:54		11:56 PM	10:08 15-18	
9:15	3:24	10:50	11:05	8:20 22		12:03 AM 78	10:18	
9:40	3:52 4	11:05	11:25	8:45		12:11	10:26	
10:00	4:04 14	11:18	11:47 AM	9:02		12:20	10:35 74	
10:20	4:16	11:32	12:09 PM	9:25 72		12:28	10:45	
10:40	4:40	11:48 AM	12:36	9:42		12:36	10:58	
10:55	5:00	12:04 PM	1:10	10:00		12:46	11:10	
11:00 18	5:17	12:17	1:25 9 2:21 7-14	10:20		12:57 18	11:22	
11:50	5:27	12:27	2:58 4	10:35		1:04	11:30	
12:15	5:37	12:36	4:00	11:00 8		1:12	11:37	
12:30	5:47	12:47	4:25	11:20		1:18	11:43	
1:00 PM 74	6:00 PM	1:05 PM 6-14	5:30 PM	11:35 AM	11:25 AM 5	1:25 AM 1:30 AM 72	11:50 PM 12:05 AM	
1:15	6:15 78	1:17		11:52 AM	11:40	1:35	12:10	
1:30	6:35	1:35		12:20 PM 74	11:57 AM	1:43	12:18	
1:42	6:48	1:46		12:32 8	12:10 PM 74	1:49	12:24	
1:55	7:00	2:12 4		12:50	12:23 6	1:58 10-38	12:33	
2:10	7:10	2:24		1:08	12:50	2:05	12:40 78	
2:23	7:20	2:40		1:20 28	1:20 17	2:11	12:48	
2:36	7:30 74	2:57		1:30	1:54 4	2:18	12:55 18	
2:47	7:40	3:19 7 3:36 8		1:48 4	2:25	2:24	1:04	
3:00	7:58	3:55		2:00	2:46	2:30	1:15 38	
3:24 78	8:16	4:15 18		2:18	3:10 8	2:40 2	1:28	
3:36 PM 18	8:24	4:24		2:29	3:40 7-18	2:47	1:33	
3:50 AM	8:43	4:40		2:58 8-18	4:15	3:02	1:50	
4:33 38	9:02	5:00		3:20	4:40	3:19	2:07 2	
4:15 AM	9:25 PM	5:30 PM		4:00 PM	5:05 PM	3:30 AM	2:20 AM	
Daily.	Daily.	Daily.	Daily Ex. Sunday.	Daily.	Daily Ex. Sunday.	Daily.	Daily.	Daily.
13	73	71	21	17	25	37	3	27

Trains are superior to trains of the same class moving in the opposite direction when running

TEEN MONTGOMERY AND MOBILE.

FIRST CLASS.				Via Time in which left for Mobile for first train	Number of Stations	Miles from Montgomery	TIME TABLE	
27	1	7	5				No. 98.	In Effect Sunday, April 7, 1912, at 12.01 a. m.
Mobileville Accom.	Limited.	Mobile Accom.	Express.				STATIONS.	
Daily.	Daily.	Daily.	Daily.					
11.15 PM	11.15 AM		7.20 AM 78	8	491	L	MONTGOMERY	N
11.38	11.25		7.30	9	496	4.5	CATOMA	
11.41	11.33		7.38 2	9	500	9.2	McGEHEE	N
11.42	11.42		7.40	13	507	15.8	TYSON	D
11.51 22	11.48		7.58	9	512	20.8	LETOHATCHIE	N
11.58	11.57 AM		8.09 71	14	518	27.2	CALHOUN	D
12.07	12.07 PM		8.20	10	523	32.5	FORT DEPOSIT	N
12.06	12.14		8.29 18	10	529	37.8	SEARCY	
12.31	12.18 72		8.33	5	581	40.3	OLGA	
12.31 4	12.24 22		8.41	8	535	44.1	GREENVILLE	N
12.35	12.34		8.54	11	541	49.8	WALD	
12.40	12.38		8.58	6	544	52.7	BOLLING	
12.07	12.43		9.04 21	7	547	56.2	CHAPMAN	D
12.15 PM	12.47		9.10 28	6	550	59.3	GEORGIANA	N
	12.51		9.20 22	6	553	62.3	DUNHAM	
	12.57		9.27	8	558	66.5	GARLAND	N
	1.06		9.38	12	563	72.5	WILCOX	
	1.12		9.47	7	567	76.0	OWASSA	D
	1.20		9.58 72	9	572	80.5	EVERGREEN	N
	1.29		10.07	10	576	85.3	SPARTA	
	1.37		10.17	12	582	91.1	CASTLEBERRY	N
	1.48		10.28	15	590	98.8	KIRKLAND	D
	1.58 21		10.40	13	596	105.4	BREWTON	N
	2.04 14		10.50	8	601	109.7	KEEGO	
	2.09		11.00 17	8	604	113.5	POLLARD	N
	2.14		11.07	6	607	116.4	WELKA	
	2.20 PM		11.15 AM	5	610	119.0	FLOMATON	N
	2.27 PM	8.40 AM	11.25 AM 26	4				
	2.32 4	8.46	11.30	8	612	121.2	MILES	
	2.41	8.54	11.39	8	617	125.5	WAWBEEK	N O
	2.46	9.01	11.44	6	620	128.0	CANOE	D
	2.53	9.09 29	11.53 AM 14	10	625	133.5	ATMORE	N
	3.00	9.17	12.01 PM	8	629	137.8	NOKOMIS	
	3.06	9.24	12.10 6	8	632	142.0	PERDIDO	D
	3.12	9.32	12.18	8	637	146.2	DYAS	N
	3.19 71	9.40	12.26	8	641	150.2	PINCHONA	
	3.26 8	9.50	12.37	7	645	154.5	BAY MINETTE	N
	3.36	10.04	12.49	12	651	160.8	CARPENTERS	
	3.40 10-25	10.10 14	12.56	5	654	162.7	HURRICANE	N
	3.50	10.24	1.13 4	14	661	169.6	NENEMOOSHA	
	4.00	10.38	1.24	12	666	175.5	MAGAZINE	D
	4.12 PM	10.50 AM 6	1.35 PM	7	670	175.0	MOBILE	N
Daily.	Daily.	Daily.	Daily.					
27	1	7	5					

Running in accordance with General Rule No. 72.

BETWEEN MOBILE AND MONTGOMERY

TIME TABLE

No. 98.

In Effect Sunday, April 7
1912, at 12:01 a. m.

FIRST CLASS

STATIONS.	Distance between stations.	Car Capacity of Passenger Coaches, based on seat space.	Min. Time in min. for No. 98 Train.	New York and New Orleans Limited				
				38 Daily.	2 Daily.	28 Daily.	6 Daily.	4 Daily.
MONTGOMERY. N	4.37		10	5.50 AM	7.55 AM	11.10 AM	5.25 PM 22	5.50 PM
CATOMA	4.68	58	10	5.39	7.44	10.57	5.14	5.39
McGHEE. N	6.56	57	13	5.33	7.38	10.49	5.05	5.32
TYSON. D	4.73	57	9	5.24 20-21	7.28 71	10.37	4.52	5.24
LETOHATCHIE. N	6.07	57	14	5.18	7.15	10.28	4.42	5.18
CALHOUN. D	5.21	66	10	5.07 17	7.02 21	10.15	4.28	5.09
FORT DEPOSIT. N	5.37	84	10	4.57	6.52	10.04	4.17 27	4.56
SEARCY	2.50	57	10	4.48	6.44	9.54	4.07	4.51
OLGA	3.50	59	5	4.43	6.39	9.49	4.01	4.47
GREENVILLE. N	5.73	122	12	4.36	6.30 17	9.40 71	3.54	4.41
WALD	2.81	42	6	4.25	6.19	9.30	3.42 73	4.32
BOLLING	3.56	75	7	4.21	6.14	9.24	3.34	4.27
CHAPMAN. D	3.05	68	6	4.15	6.07	9.17 21	3.24	4.22
GEORGIANA. N	8.08	110	5	4.10	6.00	9.10 AM 8	3.15	4.17
DUNHAM	4.24	92	10	4.05	5.53		3.08	4.12
GARLAND. N	5.84	55 W	11	3.59	5.45		3.00 73	4.06
WILCOX	3.55	61	8	3.50 78	5.35		2.50	3.57
OWASSA. D	4.56	55 E	9	3.44	5.28		2.42	3.52
EVERGREEN. N	4.64	55	9	3.35	5.19		2.30	3.44
SPARTA	5.92	58	12	3.27	5.09		2.18	3.31
CASTLEBERRY. N	7.74	89	15	3.18	4.55 78		2.05	3.27
KIRKLAND. D	6.53	56	13	3.07	4.45		1.48 7	3.18
BREWTON. N	4.30	66	8	2.56	4.32		1.35 21 F	3.05
KEEGO	3.75	57	8	2.48	4.24		1.26	2.48
POLLARD. N	2.94	83	6	2.40	4.17		1.18	2.33
WELKA	2.63	74	5	2.34	4.11		1.13	2.47
FLOMATON. N	2.15	247	5	2.28 (AL) 16 2.28 AM 16	4.05 (AM) 16 3.55 AM		1.05 (PM) 77 12.55 (PM) 14	2.49 2.37
MILES	3.53	76	8	2.17	3.50		12.48	2.33
WAWBEEK. N O	3.75	57	7	2.10	3.42		12.38	2.34
CANOE. D	5.12	57	9	2.05	3.36 75		12.32 17	2.29
ATMORE. N	4.30	92	8	1.58 15-37	3.29		12.23 26	2.22
NOKOMIS	4.18	57	9	1.48	3.21 78		12.17	2.08
PERDIDO. D	4.24	45	10	1.40	3.13		12.10 6	2.06
DYAS. N	4.22	51	7	1.32	3.06		12.01 PM	1.54
PINCHONA	3.92	58	7	1.25	3.00		11.52 AM	1.47
BAY MINETTE. N	6.06	49	11	1.15 3	2.52		11.43	1.41
CARPENTERS	2.29	59	6	1.04	2.40 37		11.31	1.32
HURRICANE. N	6.94	42	18	1.00	2.33		11.25	1.23
NENEMOOSBA	6.06	42	13	12.46	2.21		11.12	1.11
MAGAZINE. D		44	7	12.33 73	2.07 3		11.00	1.0
MOBILE. N				12.23 AM	1.55 AM		10.50 AM 7	1.0
				Daily. 38	Daily 2	Daily. 28	Daily 6	

Regular south-bound trains are superior to trains of the sea

TEENOMERY.

NORTH BOUND.

FIRST CLASS.				SECOND CLASS.								
27	6	4	8	22	72	26	14	16	74	20	78	18
Express.	Express.	Limited.	Pensacola Accom.	Local Freight.	Fast Freight.	Local Freight.	Freight.	Freight.	Fast Freight.	Freight.	Fast Freight.	Freight.
Daily.	Daily.	Daily.	Daily.	Daily Ex. Sunday.	Daily.	Daily Ex. Sunday.	Daily.	Daily.	Daily.	Daily.	Daily.	Daily.
13 PM	5.25 PM 22	5.50 PM		5.25 PM 6	2.30 PM		9.40 PM	2.40 AM	3.00 AM	6.30 AM 71	7.20 AM 6	11.00 AM
23	5.14	5.39		4.45	2.05		9.10	2.15	2.38	6.04	6.55 71	10.25
31	5.05	5.32		4.30	1.51		8.50 78	2.01	2.27	5.50	6.40	10.05
42	4.32	5.24		4.18	1.32 78		8.33 3	1.45	2.14	5.24 27-30	6.26	9.35
51 22	4.42	5.18		3.51 27	1.19		8.00	1.30	2.02	4.40 17	6.15 27	9.21
603	4.28	5.09		3.18	1.00 73		7.80 18	1.10	1.46	4.15	5.57	9.02
17 8	4.17 27	4.59		2.50 18	12.44		7.12	12.50	1.30	3.56	5.48 17	8.47 71
28	4.07	4.51		2.05	12.28		6.58	12.31 19	1.14	3.40	5.31	8.29 8
31	4.01	4.47		1.45 78	12.18 PM 1		6.46	12.19 AM	1.04	3.34	5.28	7.48 21
41 4	3.54 8	4.41 27		12.24 PM 1	11.59 AM		6.35	11.59 PM	12.52 19	3.22	5.13	7.38
56	3.42 13	4.32		11.56 AM 72	11.56 22		6.10	11.31 37	12.34	3.04	5.01	7.15
600	3.34	4.27		10.50	11.23		5.55	11.17	12.28	2.55	4.53	7.05 17
607	3.24	4.22		10.29	11.06		5.43	11.05 78	12.12	2.45	4.44	6.54
13 PM	3.15	4.17 13		10.11 71	10.55		5.30	10.44	12.01 AM	2.35 AM	4.35	6.45
	3.08	4.12		9.48 37	10.43		5.15	10.28	11.49 PM 37		4.25	6.35
	3.00 73	4.06		8.40	10.23 71-21		4.53 13	10.08 3-18	11.30 76		4.15	6.28
	2.50	3.57		8.20 17	10.19		4.32	9.36	11.08		3.50 38	6.09
	2.42	3.52 73		8.05	10.10		4.20	9.20	10.52 16		3.28	5.55
	2.30 7	3.44		7.45	9.58 8		4.04 73	9.00	10.35 3		3.14	5.43
	2.18	3.35 14		7.20	9.25 17		3.55 4	8.40	10.15		3.02	5.25
	2.05	3.27		6.55	9.12		3.06	8.20	10.03		2.49	4.58 2
	1.48 1	3.16		6.20	8.55		2.43	7.56	9.50		2.36	4.18
	1.35 21 7	3.05		5.50	8.41		2.21 21	7.30 13	9.36		2.23	3.59
	1.26	2.55 21		5.10	8.33		2.04 1	7.08	9.27		2.15	3.44
	1.18	2.52		4.45	8.24		1.43	6.50	9.18		2.07 78	3.38
	1.13	2.47		4.27	8.14		1.29	6.38	9.09		1.42	3.22
	1.05 PM 71	2.42 PM	4.45 PM	4.15 AM	8.05 AM	10.20 AM	1.05 PM 71	6.25 PM	9.00 PM 13		1.30 AM 37	3.10 AM
	1.05 PM 71	2.37 PM			8.00 AM		12.55 PM 6					
	1.48	2.32 7	4.39		7.52	10.08	12.34	6.15 73	8.42		1.19	2.00 78
	1.38	2.24 7	4.30		7.38	9.48	12.20 17	6.01	8.31		1.09	2.46 78
	1.32 17	2.19 8	4.24		7.29	9.34	12.10 PM 26	5.51	8.20		1.00	2.25
	1.22 26	2.12 71	4.14		7.14	9.09 7	11.58 AM 8	5.40	8.08		12.52	1.53 37-30
	1.17	2.06 7	4.05		7.02	8.43	11.34	5.26	7.54		12.40 3	1.38
	1.10 8	2.00 7	3.55		6.50	8.26	11.22	5.13	7.42		12.28	1.12
	1.01 PM	1.54 26	3.44		6.36	8.10	11.10	5.00	7.30 73		12.12	12.55 8
	1.52 AM	1.48 17	3.36 71		6.26	7.52	10.58	4.48	7.15		12.01 AM	12.30
	1.43 8	1.41 8	3.26 1		6.14	7.35	10.45	4.35	7.02		11.50 PM	12.12 AM
	1.31	1.28 26	3.10 26		5.50	7.15	10.25	4.15 71	6.38		11.24 13	11.47 PM
	1.25	1.23 8	3.06		5.40 78	7.05	10.10 7	3.40 1-26	6.28		11.10	11.38 13
	1.12	1.18 8	2.53 10-17		5.22 16	6.45	9.45	2.53 8-17	6.18		10.50	11.10
	1.00	1.08	2.40		5.08	6.25 78	9.28	2.28	6.00		10.32	10.50
	12.50 AM 7	12.53 PM	2.30 PM		4.50 AM	5.45 AM 18	9.10 AM	2.10 PM	5.40 PM		10.15 PM	10.30 PM
Daily.	Daily.	Daily.	Daily.	Daily Ex. Sunday.	Daily.	Daily Ex. Sunday.	Daily.	Daily.	Daily.	Daily.	Daily.	Daily.
27	6	4	8	22	72	26	14	16	74	20	78	18

Trains of the same class moving in the opposite direction when running in accordance with General Rule No. 72.

SOUTH BOUND.

SECOND CLASS.			FIRST CLASS.		
53 Freight.	51 Local Freight.	55 Freight.	65 Passenger.	63 Mixed.	27 Graceville Accom.
Daily.	Daily Ex. Sunday.	Daily	Daily Ex. Sunday.	Daily Ex. Sunday.	Daily.
6.45 AM	7.00 AM	5.00 AM 58			5.35
7.22	7.45	5.50			5.55
7.38	8.17 28	6.16			6.08
8.08 28	8.50	6.46			6.21
8.16	9.07	7.00			6.27
8.44	9.45	7.37 28			6.41
9.14	10.24 37	8.18			6.57
9.40	11.10	9.00			7.14
10.08	11.52 AM 52	9.45			7.32
10.30 AM	12.30 PM	10.15 AM	7.52 PM	6.50 AM	7.42
11.05 AM					7.47
11.10 AM 52	12.40 PM 54	10.25 AM	7.57 PM	6.55 AM	8.03
11.28	1.15				8.20
11.50 AM 54	1.55				8.30
12.02 PM	2.12				8.40
12.20	2.36				9.00
12.46	3.24				9.18
1.10	4.02				9.26
1.20	4.20				9.35
1.32	4.40				9.42
1.45	5.02				9.47
1.52	5.14				10.05
2.15 PM	6.00 PM				
Daily.	Daily Ex. Sunday.	Daily	Daily Ex. Sunday.	Daily Ex. Sunday.	Daily.
53	51	55	65	63	27

Regular south-bound trains

2/1/1906

ALABAMA AND FLORIDA RAIL

S.		Mile. Time in mts. bet. Sta. for South bound Freight trains.	Number of Stations.	Distance from Georgiana.	TIME TABLE		Distance Between Stations.	Car Capacity of Passing Stations. Based on 40 ft. per Car.	Mile. for North bound Freight trains.	Mile. for South bound Freight trains.
27	81				No. 66					
Georgiana.	Florida Accom.				In Effect Sunday, April 7, 1912 at 12:01 a. m.	STATIONS.				
Daily.	Daily									
5.35 PM	9.15 AM	27	550	-----	L	GEORGIANA N. A	8.81	31	27	
5.55	s 9.34	14	AF 559	8.81	-----	McKENZIE D.	4.69	34	14	
6.08	r 9.44	16	AF 564	13.50	-----	BROOKS	5.31	20	16	
6.21	r 9.55	7	AF 569	18.81	-----	SOUTH	2.24	14	7	
6.27	s 10.00	19	AF 571	21.05	-----	RED LEVEL D.	6.35	32	19	
6.41	s 10.15	16	AF 578	27.40	-----	RIVER FALLS D.	5.22	39	16	
6.57	s 10.24 ST	18	AF 583	32.62	-----	ANDALUSIA D.	5.96	31	18	31
7.14	s 10.36	19	AF 589	38.58	-----	SANFORD D.	6.32	30	19	36
7.32	s 10.49	8	AF 595	44.90	-----	POLEY D.	2.65	20	8	
7.42 PM	s 10.55 AM	3	AF 598	47.55	-----	OPP N.	1.00	29	3	8
7.47 PM	11.00 AM	19	AF 599	48.55	-----	DUVALL	6.80	29	19	4
8.03		22	AF 605	54.85	-----	PINK	7.38	29	22	
8.20		9	AF 613	62.23	-----	PERA	3.00	25	9	
8.30		18	AF 616	65.23	-----	SAMSON D.	4.31	30	18	
8.40		24	AF 620	69.54	-----	MARL	7.87	59	24	
9.00		19	AF 628	77.41	-----	GENEVA D.	5.59	30	19	
9.18		8	AF 633	83.00	-----	THURSTON	2.66	37	8	
9.26		9	AF 636	85.66	-----	BLACK D.	2.90	30	9	
9.35		10	AF 639	88.56	-----	HIGH NOTE	3.04	28	10	10
9.42		5	AF 642	91.60	-----	ESTO	1.81	37	5	
9.47		20	AF 644	93.41	-----	NOMA D.	6.70	37	20	
10.05 PM			AF 650	100.11	A	GRACEVILLE N. C. L.		37		
Daily.	Daily									
27	31									

Trains are superior to trains of the same class moving in the opposite direction when run

ROAD.

NORTH BOUND.

Mile. Time in mile bet Sta. for North Bound Freight Train.	FIRST CLASS.				SECOND CLASS.		
	28 Montgomery Accom.	32 Georgiana Accom.	64 Passenger.	66 Mixed.	56 Freight	52 Local Freight	54 Freight
	Daily.	Daily	Daily Ex. Sunday.	Daily Ex. Sunday.	Daily	Daily Ex. Sunday	Daily.
	Q 8.50 AM	3.10 PM			5.00 AM 55	5.00 PM	5.10
27	s 8.30	s 2.46			4.08	4.06	4.30
14	f 8.17 57	f 2.36			3.38	3.39	3.54
16	f 8.03 58	f 2.24			3.06	3.05	3.25
7	s 7.56	s 2.19			2.50	2.50	3.12
19	s 7.37 55	s 2.05 52			2.10	2.05 32	2.38
16	s 7.22	1.51			1.40	1.20	2.10
18	s 7.05	s 1.37 54			1.00	12.34 PM	1.37
19	s 6.48	s 1.22			12.20	11.52 AM 57	1.00
3	s 6.38 AM	s 1.15 PM	6.28 AM	7.20 PM	12.01 AM { 1150 PM	11.26 AM	12.45
3	6.33 AM	1.10 PM	6.23 AM	7.15 PM	11.32 PM	11.10 AM 59	12.40
19	f 6.15					10.10	12.16
22	f 5.56					9.17	11.50
9	s 5.49					8.55	11.38
13	f 5.38					8.25	11.20
24	s 5.20					7.46	10.50
19	f 5.08					7.20	10.28
8	s 4.53					7.08	10.18
9	f 4.45					6.54	10.02
10	s 4.37					6.40	9.48
5	s 4.32					6.32	9.42
20	4.15 AM					6.00 AM	9.15
	Daily. 28	Daily 32	Daily Ex. Sunday. 64	Daily Ex. Sunday. 66	Daily 56	Daily Ex. Sunday 52	Daily. 54

Running in accordance with General Rule No. 72.

SOUTH BOUND.

BETW

	2nd CLASS.	FIRST CLASS.				Mile. Time in mile. bet. Sta. for North and Pitt. Station.	Number of Station.
	55 Freight	65 Passenger	31 Florida Acoon.	63 Mixed.			
	Daily.	Daily Ex. Sunday.	Daily.	Daily Ex. Sunday.			
	10.25 AM	7.57 PM	11.00 AM	8.55 AM		26	AF 599
	11.15 AM	8.15	11.15 AM	7.25		21	FB 606
	11.50 AM	8.32	11.30	7.45		17	FB 613
	12.35 PM	8.45	11.41	8.15		5	FB 619
	12.50 PM	8.50 PM	11.45 AM	8.30		3	FB 621
				8.35		2	FB 622
				8.45 AM			FB 622A
	Daily.	Daily Ex. Sunday.	Daily	Daily Ex. Sunday.			
	55	65	31	63			

Regular south-bound trains are superior to trains of

SOUTH BOUND.

BETWEEN

	FIRST CLASS.		Mile. Time in mile. bet. Sta. for North and Pitt. Station.	Number of Station.
		101 Mixed.		
		Daily Ex. Sunday.		
		9.00 AM		FB 622
		9.15 AM		FL 624
		Daily Ex. Sunday.		
		101		

Regular trains on the McPhail and

BETWEEN OPP AND PAXTON.

NORTH BOUND.

Mile Time in min. bet. Sta. for North bound. P.M. Train.	Number of Station.	Distance from Opp.	TIME TABLE No. 96 In Effect Sunday, April 7, 1912, at 12:01 a. m.	Distance between Stations.	Car Capacity of Passenger Seating. Based on 40 ft per Car.	Mile Time in min. bet. Sta. for North bound. P.M. Train.	FIRST CLASS.			2nd CLASS.
							64	32	66	56
							Passenger	Georgiana Accom.	Mixed.	Freight
							Daily Ex. Sunday.	Daily	Daily Ex. Sunday.	Daily.
			STATIONS.							
	AF 599	1.00	L.....DUVALL.....A	7.62		26	6.28 AM	1.10	7.15 PM	11.32 PM
	FB 606	8.62	.....GREEN BAY.....	6.91	29	21	6.00	12.56	6.47	10.54
	FB 613	15.53	.....STEDMAN.....	5.58	29	17	5.43	12.45	6.25	10.20
	FB 619	21.11	.....LOCKHART.....D.....	1.57	47	5	5.27	12.35 PM	6.08	9.50
	FB 621	22.68	.....FLORALA.....D.....	1.00	37	8	5.20 AM	12.30 PM	6.00 PM 9.50 AM	9.40 PM
	FB 622	23.68	.....McPHAIL.....	0.66	27	2			9.45 9.00	
	FB 622A	24.34	A.....PAXTON.....D.....L						8.55 AM	
							Daily Ex. Sunday.	Daily	Daily Ex. Sunday.	Daily.
							64	32	66	56

to trains of the same class moving in the opposite direction when running in accordance with General Rule No. 72

BETWEEN McPHAIL AND LAKEWOOD.

NORTH BOUND.

Mile Time in min. bet. Sta. for North bound. P.M. Train.	Number of Station.	Distance from Florala.	TIME TABLE No. 96. In Effect Sunday, April 7, 1912, at 12:01 a. m.	Distance between Stations.	Car Capacity of Passenger Seating. Based on 40 ft per Car.	Mile Time in min. bet. Sta. for North bound. P.M. Train.	FIRST CLASS.	
							102	
							Mixed.	
							Daily Ex. Sunday.	
			STATIONS.					
	FB 622	1.00	L.....McPHAIL.....A	2.59		8	9.45 AM	
	FL 624	3.59	A.....LAKEWOOD.....L				9.30 AM	
							Daily Ex. Sunday.	
							102	

McPhail and Lakewood Branch are superior in either direction to terminals against each other.

1/2/11/15

BAY MINETTE

SOUTH BOUND.

		FIRST CLASS.		Min. Time in min. bet. sta. for South bound. P.M. Train.	Number of Stations.
		43 Mixed	41 Passenger		
		Daily. Ex. Sunday	Daily.		
		8.30 AM	3.80 PM	31	645
		9.16	3.54	26	FC 656
		9.54	4.18	16	FC 668
		10.18	4.32	14	FC 670
		10.40	4.44	18	FC 674
		11.10 AM	5.00 PM		FC 680
		Daily Ex. Sunday 43	Daily 41		

Regular trains on the Bay Minette

347/2g

FILED

MAR 23 1914

John L. Higgins
B. B. A.

2 x 21

24

Holloways Almer

ETTE AND FORT MORGAN

Number of Passengers	Distance from Bay Minette.	TIME TABLE No. 95. In Effect Sunday, April 7 1912, at 12:01 A. M.		Distance between Stations.	Car Capacity of Passing Siding Based on 40 per Car	bet. Sta. for North Old. Pk. Train
		STATIONS.				
45		Lv.	BAY MINETTE . N	Ar.		31
56	10.30	.....	STAPLETON	.....	12	36
63	19.12	.....	LOXLE	.....	12	6
70	24.38	.....	SILVERHILL	D.....	12	4
74	29.00	.....	SUMMERDALE	D.....	12	
80	35.00	Ar.....	FOLEY	D...Lv	12	

ette and Fort Morgan R. R. are superior in either direction to termin

AN R. R.

NORTH BOUND.

		FIRST CLASS.			
		40 Passenger	42 Mixed	44 Passenger.	
		Daily Ex. Sunday	Daily Ex. Sunday	Sunday Only	
		1.30 PM	8.00 AM	9.30 AM	
11		1.04	7.14	9.04	
36		12.42	6.38	8.40	
6		12.28	6.16	8.26	
4		12.16	5.56	8.12	
28		12.01 PM	5.30 AM	8.00 AM	
		Daily Ex. Sunday 40	Daily Ex. Sunday 42	Sunday Only 44	

to terminals against each other.

A. The schedule time of No. 18 at Fort Deposit was 8:47 and Calhoun 9:02.

Q. Forty-seven, that was five minutes of time of operation between the two?

A. More than that from forty-seven to 9:02.

Q. What is the distance between those points?

348 A. A little over five miles.

Q. The maximum rate of speed *was* authorized to be run by the train he was on was authorized to cover that distance in how many minutes?

A. Well, thirty-five miles an hour is the time, or ten minutes. The minimum time is ten minutes.

Q. At what mile post is Fort Deposit?

A. Thirty-two, I think; five thirty-two.

Q. At what point did the wreck occur?

A. Just south of mile post five twenty-eight, or, as we term it, twenty-eight. It is just twenty-eight miles south of Montgomery.

Q. How far from Fort Deposit was it to the place where the wreck occurred?

A. Not quite four miles. It lacked very little; by measurement it might be five miles—I mean to say four miles.

Q. About four miles?

A. Yes sir.

Q. Do you know how long it took Mr. Holloway on that day to go from Fort Deposit to that wreck?

Objection by plaintiff. Sustained. Exception.

Q. Was No. 18 a regular schedule train?

A. Yes sir.

349 Q. Did you hear Mr. Barrett Holloway testify yesterday as to the kind of torpedoes used at that time?

A. No sir.

Q. What kind of torpedoes were used?

A. The torpedoes we were using at that time was the very best grade I know of.

Q. How attached to the rail?

A. It lapped over and attached to the rail, a little larger than the thumb.

Q. Had you or not had use with torpedoes during the time you have been master of trains?

A. Yes sir, good deal.

Q. You know of their operation, how exploded?

A. Yes sir.

Q. State whether or not, Mr. Mizell, those torpedoes will always be exploded when passed over by engines?

A. I don't think it could fail. We have tried some that wouldn't be good.

Q. Do they always explode?

A. Not always. Some of them in experiment would fail.

Q. State whether or not the torpedo is enclosed in something?

A. Yes sir. A water-proof metal case.

Q. Is that the manner in which they come to the Company from the manufacturer?

A. Yes sir; in boxes that way.

Q. And you say there is no way to tell whether they will explode until tried?

A. No. They are fastened up so we can't. If you go in one you will ruin the top.

Q. And you say it is a fact that they sometimes do not explode?

A. Yes sir.

Q. How can you explain that?

A. I can't explain it. I have reason to believe they—they had had some torpedoes some time ago and we had instructions to make a test of all torpedoes—

Objection by plaintiff and motion to exclude from the jury.

Court excludes from the jury testimony as to the test mentioned.

Q. If the train left—Mr. Holloway's train left Fort Deposit on the day of the wreck at 2:02 and the wreck occurred at mile post 28, I believe you said, at 2:07, at what rate of speed was that train running?

Objection by plaintiff. Overruled. Exception.

A. 2:02 and 2:07,—five minutes and four miles.

Q. At what rate of speed is that running?

A. You can help me on that?

Q. You have calculated it, have you not?

A. Forty-eight miles an hour, sir.

51 Cross-examined by Mr. Jas. W. Clay for plaintiff:

Q. Mr. Mizell, what is your occupation?

A. Master of trains, sir.

Q. Located at Mobile?

A. Montgomery, Alabama.

Q. How long have you been located there?

A. I have been there—do you mean by that working?

Q. How long located at Montgomery?

A. Since '74.

Q. How long master of trains?

A. Twenty years the 12th of this month.

Q. What proportion of the time is spent on or around the trains?

A. Nearly all of it. I am supposed to be among them all the time.

Q. Out on the road?

A. Yes sir and in the Yards, office work and such as that. I deal with the train men entirely.

Q. Under ordinary conditions and in ordinary operation, the torpedo that is placed on the rail explodes, does it?

A. Yes sir, that is the supposition.

Q. I will ask you if, in your experience as master of trains and railroad work, the torpedo used at the time of Mr. Holloway's death

properly placed on the track by the flagman, does not explode nine hundred and ninety-nine times out of a thousand?

352 A. I couldn't say that it would.

Q. Could you say it would not?

A. I guess that you would find some defective ones occasionally in a thousand.

Q. Now, if they won't explode nine hundred and ninety-nine times out of a thousand, how many would?

A. I couldn't say.

Q. You have been operating over the road?

A. There are a whole lot that does not that are not reported.

Q. I mean taking your actual experience and in going over the line of the road. What proportion of them fail to explode?

A. I couldn't estimate.

Q. I will ask you if, in your whole experience as a railroad man, taking the torpedo at the time of his death, if you ever knew of two out of three failing to explode?

A. I certainly have.

Q. When?

A. About a year or eighteen months ago.

Q. They were torpedoes you had reason to believe were defective?

A. I did not know why we were called on to make the test.

Q. They were torpedoes you had reason to believe were defective?

353 A. I had no reason to think they were, but we were called upon to make the test.

Q. I will ask you if a torpedo would amount to anything or be worth anything if it failed to explode two out of three?

A. No sir.

Q. And if they did fail to explode that many times, the railroad would discard them?

A. It certainly would. In my experience in the train service we have changed torpedoes several times. This last we have been using several years and is a different torpedo as used years ago.

Q. But the one you had then was the same as now?

A. Yes sir.

Q. And that explodes more frequently than any other?

A. Yes sir; or they would not have discarded the old ones.

Q. The two torpedoes placed on the track for the purpose of calling attention to the engineer?

A. For reducing speed and to look out for danger.

Q. And to look out for danger?

A. Yes sir.

Q. And those torpedoes are supposed to be at a place where the flagman,—before passing the flagman?

A. Yes sir.

354 Q. And after they have passed the flagman, usually they place another torpedo?

A. Yes sir.

Q. And the flagman—is his duty to stand between the two torpedoes and the one torpedo?

A. Yes sir.

Q. Now, Mr. Mizell, you testified in this case on the former trial?

A. Yes sir.

Q. I will get you to state if on that occasion you stated that if the train left Fort Deposit at 2:02 P. M. and reached the scene of the wreck at 2:07 — would have been running forty five miles?

A. I said approximately.

Q. Had you made any calculation at that time?

A. No sir.

Q. Now you say forty-eight miles?

A. Yes sir.

Q. If instead of reaching the scene of wreck in five minutes it was six minutes from the time it left Fort Deposit to the scene of the wreck, at what rate of speed would it be running?

A. I can tell you in a minute. Four miles in six minutes you say?

A. Yes.

(Witness figures as requested.)

355 A. A little over forty-two miles an hour. I cannot get you exactly the decimals.

Q. Mr. Mizell, will you please give to the jury the method by which you arrive at that calculation?

A. I will tell you how I work it and you can work it. I can work it on method of taking the six minutes and multiplying by sixty, the seconds and getting the number of miles running in those seconds and dividing the whole amount the train would run in one minute and dividing it by .36 hundredths seconds to the hour and that will give it to you.

Q. Do you mean to tell the jury that a train going four miles in five minutes will not run more than six miles an hour faster than a train going four miles in six minutes?

A. A train running four miles in five minutes, making forty-eight miles an hour exactly. Five times sixty is three hundred; four miles into three hundred is seventy-five.

Q. I am going to ask you, in justice to yourself, Mr. Mizell, to go over that after you get off the witness stand, and go over your calculation, and if you find that you are mistaken, correct yourself?

A. I will. I will go over it. I might have made a mistake. I want your figures now. You say four miles in six minutes?

Q. Mr. Mizell, I will ask you whether or not if a flagman was standing on the side of the road where he ought to stand to flag a train—if a man was standing on the cow-catcher or tender of
356 the engine, would the flagman see the man on the engine?

Objection by defendant. Sustained. Exception.

Q. Is there any obstruction between a man standing on the cow-catcher of the engine that would prevent his seeing the man on the track?

Objection by defendant. Sustained. Exception.

Q. Is there any obstruction in front of the cow-catcher at all?

Objection by defendant. Sustained. Exception.

Q. Is there anything on an engine, any obstruction upon an engine which would prevent a man on the cow catcher from being seen by a man in front of the engine on the track?

Objection by defendant. Overruled. Exception.

A. There is none whatever that I know of unless approaching some obstruction like a cattle-guard.

Q. My question was—is there any obstruction on the engine?

A. No sir.

Q. Then how far could the fireman, sitting in his seat on his side of the engine, see a flagman on the opposite side of the railroad track from the engine, if the flagman be close to the track?

Objection by defendant. Sustained. Exception.

357 Q. How far down the track can the engineer in his position, see a flagman on the opposite side of the track? I say a straight track.

Objection by defendant. Sustained. Exception.

Q. To what extent does the front of the engine obstruct the view of the fireman as to obstructions on the opposite side of the track from the fireman on the straight track?

A. There is none at all until he gets directly up to the flagman.

Q. Within what distance from the flagman?

A. Within ten or fifteen feet, and then it obstructs the view of the fireman if the flagman is on the engineer's side.

Q. But up to fifteen feet there is no obstruction?

A. No sir.

Q. To what extent will the front of the engine obstruct the view of the flagman on the engineer's side, as to the fireman sitting on the fireman's side?

A. Are you putting the flagman on the fireman's side?

Q. The other side.

A. About the same thing, provided it is not on a curve.

Q. Say on a straight track where the view is unobstructed for seven hundred and fifty feet?

A. You could see plainly the flagman within ten or fifteen feet of the engine.

358 Q. Now, Mr. Mizel, I don't believe any of the other witnesses have stated it: Where is it the duty of the flagman to stand with reference to the railroad track when flagging an approaching train?

A. He should stand on the engineer's side.

Q. Within what distance of the railroad track?

A. Either on the rail or close to the end of the ties.

Q. It would not be more than a foot or two?

A. I should say two feet; there might be some obstruction on the car that would hang over far enough to hurt it.

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Re-examined by Mr. John C. Worsham, for defendant:

Q. That depends, does it not, on the location of the ground at the point in question?

A. Yes sir.

Q. How far is the end of the cattle-guard from the track at this point where Taylor says he was on just there?

A. The cattle-guard extends from the end of the ties to the end of the ties and then a fence built up and runs out to protect any cattle from coming on the cattle-guard.

Q. At that point is there a cut and a curve on the railroad?

A. Just North of that point, there is a cut and a curve.

Q. How wide is the cut?

A. I don't know. I think, the best of my recollection of the cut is about four feet from the end of the ties at that point.

359 Q. How far is the fence of the cattle-guard from the rail on the right hand side, going North?

A. The fence starts up with a slope about the end of the ties. I believe the ties are about eighteen or twenty inches from the rails.

Q. How high does it rise?

A. Up four or five panels.

Q. How distant from the top panel? How far distant from the rail?

A. About three or four feet.

Mr. Worsham (cont'g after noon):

Q. Have you figured up?

A. It is forty miles an hour, I just made a mistake in subtracting.

Q. You are the master of trains and run the trains down there, do you?

A. Yes sir.

Q. On certain basis?

A. Yes sir, I speed them on a second basis. I use a split second watch and it is easier to work it by seconds than minutes.

Q. At the time Mr. Holloway lost his life, in what pool, to what pool was he assigned, First or Second Pool?

360 A. I am of the opinion that it was Second Pool.

Q. What is the difference between the two?

A. The Second Pool has to take what running they can get. The First Pool is preferred.

Q. In other words, the First Pool is preferred?

A. Yes sir.

Q. From the first of January, 1912, up to the time of the accident, state whether or not the men in Second Pool had been given more work than usual or not?

Objection by Plaintiff Overruled. Exception.

Q. From January 1st, up to the time of the collision, with reference to the amount of work performed by engineers in Second Pool, what was it?

Objection by Plaintiff Overruled. Exception.

Q. Including Mr. Holloway?

A. The best of my recollection of the matter, we were having pretty heavy business; naturally running everybody as much as we could run them, and on a mileage basis. I am of the opinion they made a good mileage.

Q. What does the discharge of one torpedo on the track signify to the engineer?

A. Stop at once?

Q. State whether or not it is the danger signal?

A. Yes sir.

361 Recross-examined by Mr. Jas. W. Clay, for plaintiff:

Q. The men in the Second Pool, as I understand you, take work just as assigned to them?

A. That he is assigned to regular work.

Q. My question is, that the engineers in the second Pool have to take work assigned to them?

A. As it comes; as the service demands.

Q. The men in the first Pool have regular runs?

A. Not all of them. There is assigned men to regular runs and then the First Pool. The assigned men have nothing to do with the First Pool and the First Pool do all the work they can and then the Second Pool. They stand first in and first out in First and Second Pool. If a man is run out of First Pool on the regular run, the first man in Second Pool takes his place.

Q. But the man on regular runs is in First Pool?

A. No sir. He is on assigned runs.

Q. Then the employment is more regular than either of the other kinds?

A. Yes sir.

Defendant rests.

362 At this point, plaintiff asks to read in rebuttal part of the deposition of Mr. Rollo that was passed this morning. That part of deposition is here read and will be found copied in the Clerk's record.

It is agreed that the testimony of J. B. Smith taken at the last trial and shown in the transcript of evidence of that trial may be read as evidence at this trial. Said testimony was here read and will be found copied in the Clerk's record.

At this point the deposition of J. O. Gibson was read by plaintiff in rebuttal, and will be copied by the clerk and made a part of the record.

By the Court:

The Court will say to the jury that the evidence as to the reputation of Taylor is not introduced as to how this accident occurred, but only on the weight and credibility you will attach to his evidence, and you will consider it only for that purpose.

363 STATE OF KENTUCKY,
 County of Henderson:

I, Annie Laurie Hardesty, official stenographer of the Henderson Circuit Court, do certify that the within is a full, true and accurate transcript of the oral evidence heard on the trial of the suit of John G. Holloway's Administrator vs. Louisville & Nashville Railroad Company, at the May term 1915 of the Henderson Circuit Court.

Given under my hand this — day of — 1915.

ANNIE LAURIE HARDESTY,
Official Stenographer, Henderson Circuit Court.

STATE OF KENTUCKY,
 County of Henderson:

I, J. W. Henson, Judge of the Henderson Circuit Court do hereby certify that the foregoing is a complete and accurate copy of the oral evidence heard on the trial of the case of John G. Holloway's Administrator vs. Louisville & Nashville Railroad Company at the May Term 1915 of the Henderson Circuit Court.

Witness my hand, this 24th day of Sept., 1915.

J. W. HENSON,
Judge Henderson Circuit Court.

364 Be it remembered that heretofore, to-wit on February 3rd, 1916, the Court of Appeals of Kentucky entered the following judgment:

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,
 vs.
JOHN G. HOLLOWAY'S ADM'R, Appellee.

Appeal from Henderson Circuit Court.

The Court being sufficiently advised it seems to it that there is no error in the judgment herein. It is therefore considered that the judgment of the lower court be affirmed, and that the appellee recover of the appellant 10% damages on the amount of the judgment superseded herein, which was certified to said court.

It is further adjudged that the appellee recover of the appellant its costs herein expended.

And on the above judgment, the following opinion was rendered, to-wit:

365

Court of Appeals of Kentucky.

February 3, 1916.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

Appeal from Henderson Circuit Court.

Opinion of the Court by Judge Carroll, Affirming.

In May, 1912, John G. Holloway, a locomotive engineer in the service of the appellant railroad company, while operating a freight train between Pensacola, Fla., and Montgomery, Ala., was killed in a collision between his train and a work train.

His administrator qualified in Henderson county, Kentucky and instituted this action in that county under the Federal Employers' Liability Act to recover damages for his death. On the first trial of the case there was a verdict and judgment for \$32,900, but
366 on appeal to this court, the judgment was reversed, in an opinion that may be found in 163 Ky., 125. On the return of the case to the lower court there was a re-trial with a verdict and a judgment thereon for \$25,000, to reverse which this appeal is prosecuted.

It does not appear necessary to state with any elaboration the facts surrounding the collision in which Holloway lost his life, because there was sufficient evidence to warrant the jury in finding that Holloway while free from contributory negligence came to his death on account of the negligence of the flagman of the work train with which the engine Holloway was on collided. And this issue of fact was submitted to the jury under proper instructions, and the jury necessarily found that the negligence of the flagman was the direct cause of the collision.

But, briefly, the evidence shows that the worktrain had stopped at a point between two stations; that it was the duty of the flagman of the worktrain to go back the distance required by the rules and stop the freight train in charge of Holloway by signals and torpedoes, and that he failed to give the required signals, or any signals; that Holloway not being warned of the presence of the worktrain on the track at the place where the collision occurred, was going a good rate of speed when his engine, while rounding a curve in the track, ran into the worktrain.

367 On the former appeal the judgment was reversed; first, because it was not alleged or proven that the widow of Holloway who left no children surviving him, had during his life received any pecuniary benefits from him, or that she had any expectation of receiving any from him in the future if he had not lost his life; and, second, for error in the instructions.

On a return of the case an amended petition was properly allowed

to be filed setting up that the decedent, Holloway, and Myrtle S. Holloway, the person for whose benefit the action was instituted, were married and lived together as husband and wife and were so living at the time of his death; that Myrtle Holloway, at the time of the death of the decedent, "had a pecuniary interest in his life and in his estate and was dependent upon him for maintenance and support and by his death she suffered a pecuniary loss of fifty thousand dollars, the amount claimed in the original petition"; and the evidence introduced on the trial, to be later noticed with more fullness, showed beyond question that the widow was dependent upon the deceased for maintenance and support and had a pecuniary interest in his life, and that by his death she sustained a pecuniary loss.

Some question is raised by counsel that the amended petition as well as the evidence under it was insufficient to meet the requirements of the federal statute, because it failed to specifically point out the particulars in which she suffered a pecuniary loss on account of his death, or the amount of pecuniary benefits she had received from him during his life, or the amount she had reasonable expectation of continuing to receive if he had lived. But we do not find any substance in this criticism of the amended petition or of the insufficiency of the evidence offered in support of it. Under the federal statute as construed by the Supreme Court of the United States in *Norfolk & Western Ry. Co. v. Holbrook*, 235 U. S., 625, 59 Law Edition 392, there can only be a recovery for a pecuniary loss; but we think that when the petition shows the relation of the dependent to the deceased a general averment that the person for whose benefit the action was brought was dependent upon the deceased and had a pecuniary interest in his life and suffered a pecuniary loss by his death is sufficient without setting out in detail the reasons showing the dependency or the extent of the pecuniary loss. When an issue is found on this question, it then becomes a matter of evidence, and the nature of the dependency and the extent of the pecuniary loss may be developed.

It is also insisted that the trial court did not have jurisdiction of the subject-matter of the action for the reason that, contrary to the requirements of the federal Constitution, the State law permits three-fourths or more of the jurors to return a verdict, which will have the same force and effect as if it had been returned by the entire panel. This identical question has been disposed of adversely to the contention of counsel for the appellant by this court in *C. & O. Ry. Co. v. Kelly's Admx.*, 161 Ky., 655; *L. & N. R. R. Co. v. Johnson's Admx.*, 161 Ky., 824, and *L. & N. R. R. Co. v. Stewart's Admx.*, 163 Ky., 823. In the *Kelly* case the reasons for the holding of the court are stated at length, and need not be repeated here. But in order to save to appellant the right to raise this question on appeal to the Supreme Court of the United States, if it desires to prosecute an appeal, we again affirm that the State law is not violative of the federal Constitution, and that in cases arising under the Federal Employers' Liability Act the trial courts of this State have jurisdiction, and it is proper to instruct

the jury "that if all twelve can not agree on a verdict, as many as nine may agree and return a verdict, but if less than twelve and as many as nine agree on a verdict, those who agreed to it must sign it." It might, however, be here further noticed that the verdict was agreed to by the full jury of twelve.

The instructions on the subject of the measure of damages and the diminution thereof in proportion to the contributory negligence of the decedent, if any, is also criticized; but, in our opinion, 370 it answered fully all of the requirements of the federal statute as construed by the Supreme Court, and also conformed to the rule laid down by this court in *C. N. O. & T. P. Ry. Co. v. Goode*, 163 Ky., 60. The instruction reads:

"The court further instructs you that even though you may believe from the evidence that the defendant by or through its officers, agents or employers was guilty of negligence as above defined, if any there was, yet if you shall further believe from the evidence that the deceased, John G. Holloway, was also negligent, that he failed to keep a lookout for signals, if he did so fail, or failed to use ordinary care to stop his train after discovering the worktrain was on the track, or failed to exercise ordinary care to leave his train and prevent injury to himself, if he did so fail, after discovering the danger, if any, and that but for such contributory negligence, if any, the accident and injury would not have occurred and his death resulted, yet such contributory negligence, if any, will not bar or prevent recovery by the plaintiff under the second instruction; but in such event the damages, if any, shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to the said John G. Holloway by reason thereof. So that the plain- 371 tiff will not recover full damages but only a proportional part bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both the said Holloway and the defendant."

The principal ground, however, urged for reversal is that the damages are excessive. On the subject as to what damages might be allowed, the court told the jury that if they found for plaintiff, the measure of recovery was "such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed." This instruction of course was to be read in connection with the instruction on contributory negligence, under which the jury was authorized, if they believed the deceased was guilty of such negligence, to diminish the amount of the recovery according to the rule laid down in the instruction on this subject.

The Supreme Court of the United States in *North Carolina Ry. v. Zachary*, 232 U. S., 248, 58 L. Ed., 591; *Michigan Central R. R. v. Vreeland*, 227 U. S., 59, 57 L. Ed., 417; *Gulf, Colorado, etc., Ry. v. McGinnis*, 228 U. S., 173, 57 L. Ed., 785; *Garrett v. L. & N. R. R.*, 235 U. S., 308, 59 L. Ed., 242; *Southern Ry. v. Leslie*, 238 U. S., 599, 59 L. Ed., 1478, and in many other cases has held that the damages are limited to the pecuniary loss sustained by the benefi-

ciary, and the instruction on this subject was correct, as it limited the jury to the ascertainment of such a sum as would compensate the widow for the loss of the pecuniary benefit she might
372 have received if the deceased had not been killed.

Counsel for the company argue that the wording of this instruction was "calculated to mislead the jury and to induce them to allow the widow for the damage done to the decedent's estate as well as for the damage she sustained individually"; but we do not think the instruction is at all susceptible of this construction or that the jury could have understood in assessing the damages that they might estimate the loss suffered by the decedent's estate as well as the loss sustained individually by the widow. If an instruction phrased as this one does not state correctly the measure of recovery, it would be difficult to frame one that would.

If the jury, as urged by counsel, assessed the damages at too large a sum or allowed the widow, as is said, an amount largely in excess of the pecuniary loss she sustained, this finding cannot be attributed to any fault in the instruction; nor are we prepared to say that under the evidence and the reasonable inference to be drawn therefrom, the amount awarded is substantially more than the facts justified.

In order that the facts before the jury furnishing the data on which the assessment was made, may be understood, we think it well to set out briefly what the record shows on this subject. The deceased, Holloway, at the time of his death was thirty-four years old. He was in perfect health and a man of exceptionally fine habits.

He was sober, capable, industrious, ambitious and saving; de-
373 voted to his wife and fond of his home life. He started with the company as a laborer and was promoted from time to time until, in the course of a few years, he had reached the position of a regular locomotive engineer. During the first years of his married life he had only been getting from fifty to one hundred dollars a month, but after this his salary was raised to one hundred and fifty dollars a month, and a few months before his death he had been promoted to the place of regular engineer and was earning over two hundred dollars per month. He had been married about four years and a half to the woman he left a widow, and who had no income or means of support during their married life other than such as she received from her husband. It was his habit when he received his wages, which was paid in money each month, to take it home and give it to his wife, who put it in a bank to their joint credit only using such part as was needed for their living expenses.

At the time of his death she had on deposit to their joint credit about eight hundred and fifty five dollars that had been saved from his earnings; and in addition to this there was about three hundred and twenty five dollars due to him from the company as his wages for about a month and ten days before his death. It might also be properly stated here that the bank deposit was the savings from his salary after it had reached one hundred and fifty dollars and then two hundred dollars per month, as previous to that time his salary had only been from fifty to one hundred dollars per month, so that

until within a few months before his death little could be saved after paying the living expenses. It may therefore safely
374 be said that he had saved out of his wages over eleven hundred dollars, the amount on deposit and due him from the company, in the last year of his life after paying the living expenses of himself and his wife.

This brief statement shows in a very striking way the fine character of man the deceased was, and gave to the jury, as we think, the right to give to his widow as compensation the very largest sum that a fair estimate of the pecuniary loss she sustained would justify.

Now what was her reasonable expectation of pecuniary benefits if her husband had lived his allotted time, which, according to Wigglesworth Tables was something over 28 years and according to the Carlisle Tables something over 31 years, or say 30 years? Or, stating it in another way, what was the sum of the pecuniary loss she sustained on account of his death? We think that in estimating his earning capacity it is fair to assume, considering his character, habits and health, as well as his capability, that his earning capacity in the line of his employment would at least not be decreased and that if any change were made it would be increased. But putting it at two hundred dollars a month, or twenty four hundred dollars a year, if he lived his allotted time, and followed his avocation he would have earned seventy two thousand dollars. If he should have earned in this period on an average of only one hundred and fifty dollars a month, the sum of his earnings would be fifty four thousand dollars. Or if his average wages should have been only twelve hundred dollars a year, he would have earned in this time thirty six thousand dollars. Looking, therefore, at the matter from the standpoint of these figures, it is apparent that the probable pecuniary loss was very large.

375 In *Michigan Central R. R. Co. v. Vreeland*, 227 U. S., 59, 57 L. Ed., 417, the court said, in discussing the meaning of pecuniary loss: "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have — deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings.
* * * A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.'"

In *Tiffany on Death by Wrongful Act*, section 158, in discussing the word "pecuniary" in statutes like the one here in question, it is said: "The use of "pecuniary" to designate the kind of loss for which recovery can be had is misleading, for the damages are by no means confined to the loss of money, or of what can be estimated

in money. As will be seen, damages are recoverable for the loss of the services of husband, wife, and child, and also for the loss by a child of the care, education, and counsel which he might
376 have received from his parents. The word has been used rather for the purpose of excluding from the recovery damages to the feelings and affections than of confining the damages strictly to those injuries which are 'pecuniary,' according to the ordinary definition."

And in section 160: "The pecuniary loss which a wife sustains by the death of a husband, and which a minor child sustains by the death of a father, necessarily includes the loss of support which the deceased owed them respectively. The measure of damages is the amount which the deceased would probably have earned during his life for their benefit, taking into consideration his age, ability, and disposition to work, and habits of living and expenditure. To this may be added, according to some cases, the amount which he would probably have accumulated, and which they might reasonably have expected to inherit."

But counsel for the railroad company argue that under no state of case should the recovery have exceeded \$17,166.00. They get this amount by multiplying the life expectancy of the deceased by fifty dollars a month, or six hundred dollars a year, that being the annual sum it is claimed the husband was contributing for the support of his wife at the time of his death.

We do not of course know by what method of calculation the jury arrived at the amount awarded, but if in reaching a conclusion they considered, as they had a right to do, the amount in excess of living expenses received by the widow out of her husband's wages when he was getting a hundred and fifty and two hundred dollars a month.

the pecuniary loss she sustained should not be limited to the
377 amount required for her support and maintenance because he gave her all of his wages, and the savings were put in bank to their joint credit. So that it may fairly be said that at the time of his death she was receiving as pecuniary benefits from him not only her support and maintenance of fifty dollars a month but in addition thereto one-half of the savings; or, in other words, one hundred dollars a month. Under these conditions the jury might well have considered that the pecuniary loss sustained by the widow was one hundred dollars a month, or twelve hundred dollars a year, which would make a total sum much larger than the award.

The federal statute does not fix any rule by which to measure the damages in cases like this, nor is there any statute in this State on this subject. So that the amount to be awarded is not controlled by any statute law. It is left to the jury to say what the finding shall be; and under the settled practice of this court their finding will not be interfered with unless it strikes the mind at first blush as being grossly excessive; or, in other words, is so excessive as to appear to have been given under the influence of passion or prejudice.

In the consideration of this matter it will at once be perceived that it is exceedingly difficult for a court or a judge to say when a verdict in cases like this is excessive or when it is so largely more than in

reason should be awarded as to justify the court in setting aside the finding of an impartial jury who are equally if not better qualified to determine questions like this than would be a judge or the
378 court. It does not appear and is not urged that in hearing and disposing of this case the jury were influenced by either passion or prejudice. The complaint is rested solely on the ground that the assessment of damages is excessive. But if we should say that it was excessive, and that for this reason the judgment should be set aside, upon what ground should we rest our decision? Upon what ground could we with propriety interfere with the finding of that tribunal to whom the Constitution and laws of this State have committed the settlement of disputed questions of fact like this? It is, as we have stated, a case presenting exceptional facts upon which a large verdict might well be sustained, and we do not feel authorized on these facts to set up our judgment against that of the jury. *C. & O. Ry. Co. v. Kelly*, 160 Ky., 296; *C. & O. Ry. Co. v. Dwyer*, 162 Ky., 427.

The jury in this case had before them and had the right to consider in determining the pecuniary loss sustained by the widow the earning capacity, age, health, habits, character, occupation, expectancy of life, and mental and physical disposition to labor of the deceased; *Norfolk & Western Ry. Co. v. Holbrook*, 235 U. S., 625, 59 L. Ed., 392; *Kansas City Southern Ry. v. Leslie*, 238 U. S., 599, 59 L. Ed., 1478; *Vicksburg & Meridian R. R. Co. v. Putnam*, 118 U. S., 545, 30 L. Ed., 257; *Richmond & Danville R. R. Co. v. Elliott*, 149 U. S., 266, 37 L. Ed., 728.

They were allowed to have this data so that they might approximately at least fix the recovery in such a sum as would reasonably meet the pecuniary loss the widow had sustained. As was said by this court in *C. N. O. & T. P. Ry. Co. v. Lovell's Adm'r*, 141 Ky., 249: "Of course how long a person will live, or how much he will earn, or how much he will save, or how much he will leave at his death, are in the very necessity of things unknown problems. No human being can tell how long any person will live, and consequently

no person can say how much his estate from a pecuniary
379 standpoint will lose by his death. But in compensating the estate of a person who has been killed by negligence for the destruction of his power to earn money, it is more just and reasonable to assume that he will live the allotted time and that he will observe habits of thrift and industry than to assume that he will be stricken with disease or become idle and worthless or die many years before his expectancy of life has ended. And so it is that in dealing with the wrong-doer, the law requires him to give the injured person or his estate such a sum as under the most favorable conditions will compensate him or his estate for the loss occasioned by his wrongful act.

* * * When the jury has before it all the evidence that either party desires to introduce, relating to the health, habits, earning capacity, character and probable duration of life of the deceased, and are then directed to assess the damages at such a sum as will compensate his estate for the destruction of his power to earn money, they have before them every fact upon which an estimate of the loss sus-

tained can be based, and it is to be presumed that in making up their verdict the jury will take into consideration all of the facts indicated."

The amount of damage is, as we have stated, large, but the sum is not more than has been permitted to stand by the Supreme Court of the United States in cases arising under this statute. Thus in the case of *Great Northern Ry., v. Otos*, decided Dec. 13, 1915, the recovery in a state court in Minnesota of a judgment for thirty thousand dollars, damages for personal injuries sustained by a switch foreman twenty-six years old who at the time of his injury was earning from one hundred and five to one hundred and fifteen dollars a month, was not disturbed.

380 And in *Southern Ry. v. Bennett*, 233 U. S. 80, 58, L. Ed., 860, on the trial in a state court there was a recovery for twenty thousand dollars, and on appeal the Supreme Court said: "The argument is this: the deceased was making not more than nine hundred dollars a year, and the only visible grounds of increase was the possibility that he might be promoted from fireman to engineer, with what pay is not shown. He could not have given more than seven hundred a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore, at the legal rate of interest the income from ten thousand dollars for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of twenty thousand dollars out and out. It may be admitted that if it were true that the excess appeared as a matter of law,—that if, for instance, the statute fixed a maximum and the verdict exceeded it,—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error: *Lincoln v. Power*, 151 U. S., 436, 38 L. Ed., 224; *Herencia v. Guzman*, 219 U. S. 44, 55 L. Ed., 81. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

381 Upon the whole case we find no reason for disturbing the judgment, and it is affirmed.

N. Powell Taylor, Henderson, Ky; John C. Worsham, Henderson, Ky; Benjamin D. Warfield, Louisville, Ky., for appellant.

Clay & Clay, Henderson, Ky., for Appellee.

[Endorsed:] Feb. 3/16. L. & N. R. R. Co. v. Holloway.

382 And then again on the 28th day of April, 1916, in the Court of Appeals of Kentucky, the following order was entered.

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,
vs.
JOHN G. HOLLOWAY'S ADMR., Appellee.

Came appellant by counsel and filed petition for re-hearing with notice.

The petition referred to in the foregoing order is in words and figures as follows:

383 Court of Appeals of Kentucky, Winter Term, 1916.

No. 34.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

From Henderson Circuit Court.

Appellant's Petition for Rehearing.

The opinion will be found in 168 Ky., at page 262.

Because of the magnitude of some of the questions involved, and of our firm conviction that the court has decided them incorrectly, we respectfully and earnestly ask the court to grant appellant a rehearing in this case, and on such rehearing to withdraw the opinion heretofore delivered, and to deliver an opinion reversing the judgment of the Henderson Circuit Court.

I. The Seventh Amendment as it Affects Suits in State Courts under the Federal Employers' Liability Act.

In the opinion it is said:

"It is also insisted that the trial court did not have jurisdiction of the subject-matter of the action for the reason that, contrary to the requirements of the Federal Constitution, the State law permits
384 three-fourths or more of the jurors to return a verdict, which will have the same force and effect as if it had been returned by the entire panel. This identical question has been disposed of adversely to the contention of counsel for the appellant by this court in C. & O. R'y Co. v. Kelly's Admx., 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admx., 161 Ky. 824, and L. & N. R. R. Co. v. Stewart's Admx., 163 Ky. 823. In the Kelly case the reasons for the holding of the court are stated at length, and need not be repeated here. But in order to save to appellant the right to raise this question on appeal to the supreme Court of the United States, if it desires to prosecute an appeal, we affirm that the State law is not violative of the Federal Constitution, and that in cases arising under the Federal Employers' Liability Act the trial courts of this State have jurisdiction, and it

is proper to instruct the jury 'that if all twelve can not agree on a verdict, as many as nine may agree and return a verdict, but if less than twelve and as many as nine agree on a verdict, those who agreed to it must sign it.' It might, however, be here further noticed that the verdict was agreed to by the full jury of twelve."

In disposing of this question in the Kelly case, *supra*, 161 Ky., the court said:

"Counsel for appellant, in a petition for a rehearing, present for the first time the argument that the judgment below should be reversed because the Montgomery Circuit Court had no jurisdiction to entertain or determine the action.

"The Seventh Amendment to the Constitution of the United States provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules at common law.' And it has been uniformly held by the
385 Supreme Court of the United States that the jury trial contemplated by this section is the right to a trial by a jury of twelve men whose finding shall be unanimous: *American Publishing Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.

"Section 248 of the Constitution of this State reads in part: 'The General Assembly may provide that in any or all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel.'

"Section 2268 of the Kentucky Statutes, enacted pursuant to this constitutional provision, provides: 'That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it.'

"Section six, as amended in 1910, of the Federal Employers' Liability Act, provides that 'Under this act an action may be brought in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States and no cases arising under this act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States.'

"The argument against the jurisdiction of the Montgomery Circuit Court is this: It is said that Congress did not have power to confer or commit jurisdiction of cases arising under the Federal Employers' Liability Act to the courts of any State that does not recognize the binding necessity for a jury of twelve and a unanimous verdict, or that has by its Constitution and laws taken from its courts the

386 authority to require a unanimous verdict of such a jury, because under the Seventh Amendment it is indispensable that every court that hears and determines a common-law case arising under congressional legislation shall have the power to require a jury of twelve and a unanimous verdict, which power is denied to the courts of this State by the Constitution and statutes of the State.

"It will, however, be observed that this congressional legislation does not confer jurisdiction on State courts to hear and determine cases arising under the act; it merely recognized the existing jurisdiction of State courts, and to make plain this jurisdiction the act provides that 'no cases arising under this act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States.'

"It is further well established that State courts may take jurisdiction to enforce civil rights and liabilities arising under congressional legislation unless there be something in the congressional legislation forbidding the state courts to take jurisdiction of cases arising under it. Thus it was said in *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; 'The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. * * * If an Act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State Court. The fact that a State Court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws.'

"In *L. & N. R. R. Co. v. Scott*, 133 Ky. 724, the suit was brought in the State Court against the railroad company to recover damages under the congressional legislation known as the Carmack amendment to the Interstate Commerce Act, and in holding that the State Court had jurisdiction to enforce the provisions of this act, we said:

"The acts of Congress within the sphere of its jurisdiction are the law of the land no less than the acts of the State Legislature within the sphere of its jurisdiction, and as the court must take judicial notice of these laws, and as facts of which it must take judicial notice, by the Code, need not be stated in the pleadings, it was unnecessary for the plaintiff to refer to the United States statute in his petition. Accordingly, we have uniformly given judgment against carriers where they had, in shipping stock from one State to another, failed to water the stock, as required by the Act of Congress, without any reference in the pleadings of that act.' This case was affirmed by the Supreme Court of the United States in *L. & N. v. Scott*, 219 U. S. 209, 55 L. Ed. 183.

"Speaking of the Federal Employers' Liability Act in *Mondou v.*

N. Y., N. H. & H. Railroad Co., 223 U. S. 1, 56 L. Ed. 327, the Supreme Court said, in reference to the action of the Connecticut Court in declining to take jurisdiction of cases arising under the act, that 'there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure. * * * We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

"Inasmuch then as State courts, as a matter of right independent of congressional sanction, have jurisdiction to enforce civil rights and remedies created by congressional legislation unless the right is denied by the legislation, it is difficult to understand upon what ground the assertion can be soundly rested that the Seventh Amendment controls jury trials in State courts in the face of the often-repeated declaration of the Supreme Court that this amendment affects only trials in courts of the United States. Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Bolin v. Nebraska, 176 U. S. 83, 44 L. Ed. 382; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. Ed. 223; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.

"It therefore seems to us that when State courts are given jurisdiction to hear and determine causes of action created by Federal legislation they may exercise this jurisdiction according to the practice and procedure of the forum and under the jury system adopted, subject of course to such conditions as Congress may attach to the legislation; and Congress did not in the legislation here in question, attempt to attach any conditions to the practice and procedure through which the jurisdiction of State courts of competent jurisdiction might be exercised in the enforcement of rights arising under this act. Gibson v. Bellingham & N. Ry. Co. 213 Fed. 448; Winters v. Minneapolis & St. L. R. R. Co., Minn., 148 N. W. 1093.

"It might be added that as it appears from the record that there was in this case a jury of twelve and a unanimous verdict, it may seriously be questioned if the appellant has the right to raise the constitutional question we have discussed. But, in order to remove any doubt of the right of appellant to avail itself on appeal of an adverse ruling on the subject presented in the petition for a rehearing, we have stated our views at some length.

"The petition for a rehearing is overruled."

In the Johnson case, supra, 161 Ky. 824, the court said (p. 836):

"In administering the Federal Employers' Liability Act in our courts we think the practice and procedure followed in the trial of common-law actions generally should be observed in the trial of cases arising under this act. C. & O. R'y Co. v. Kelly's Admx.,

161 Ky. 655. In other words, except in so far as the act itself modifies or changes rules of practice and procedure or substantive law, cases arising under the act should be heard and determined in the State courts in the same manner as would like cases arising under the law prevailing in this State."

And in the Stewart case, *supra*, 163 Ky. 823, the court said (pp. 827—828):

"It is also contended by appellant that the court erred in giving to the jury an instruction, authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the State courts of cases controlled by the Federal Employer's Liability Act, there must be a unanimous verdict by twelve men, as required by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon State courts not so constituted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant that Congress by the Act of April 5, 1910, amending the Federal Employers' Liability Act did not grant jurisdiction to State courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the act mentioned.

"Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claims. *Ches. & Ohio R'y Co. v. Kelly's Admx.*, 161 Ky. 655; *L. & N. R. Co. v. Johnson's Admr.*, 161 Ky. 824."

We have thus stated all that this court has said on this subject, in order to enable the court, without having to refer to the reports containing the cases, *supra*, to contrast what we are about
390 to say with what is stated in those opinions.

With great respect, it seems to us that the court considered and decided this great question from a false angle, in that the question is treated merely as one affecting the "practice and procedure of the forum," instead of one limiting the power of Congress and so inhering in the Act of Congress known as the Federal Employers' Liability Act. The Seventh Amendment is an amendment which affects Congress, not merely the courts. Congress has no power to enact a statute which is contrary to or which is freed from the limitations of the Seventh Amendment. Therefore, Congress has no power to confer jurisdiction on State courts, any more than it would have the power to confer jurisdiction on Federal courts, to try cases brought under the act freed from the limitations of the Seventh Amendment; that is to say, with less than twelve jurors whose verdict is unanimous as required by that amendment. And if the amendment to the Employers' Liability Act which vested jurisdiction in State courts to try cases arising under the act is not so construed, it is unconstitutional and void, because in conflict with the Federal Constitution by which Congress is controlled.

The right of action given by the Federal Employers' Liability Act

is not a right of which State courts had jurisdiction prior to the act; that right had no existence prior to the act. It is not a common-law right, but one created exclusively by an Act of Congress. At
 391 the common law, the employer had the benefit of the defenses of fellow-servant and contributory negligence. And it was that kind of a cause of action of which the State courts had jurisdiction, by reason of their general judicial power, prior to the enactment of the Federal Employers' Liability Act. By the statute, the fellow-servant doctrine is swept away entirely; and the doctrine of contributory negligence as at common law is so far modified as that it is no longer a bar to recovery, but goes only in mitigation of damages.

Let us consider whither the reasoning of this court on this question leads: The court is bound to concede that causes of action under the Employers' Liability Act which are tried in Federal courts must be tried before juries composed of twelve men whose verdict is unanimous. (*Capital Traction Company v. Hof*, 174 U. S. 1-13; *American Publishing Company v. Fisher*, 156 U. S. 454, 468; *Walker v. N. M. & Southern Pacific R. Co.*, 165 U. S. 593, 596.) In other words, it will be conceded that Congress is prohibited by the Seventh Amendment to the Constitution of the United States from creating a cause of action triable in the courts of the United States freed from the trammels of the Seventh Amendment. Causes of action under the Federal Employers' Liability Act, then, are created by the Federal Congress and administered by the courts of the several States as agencies of the Federal Sovereign, subject to review by the Federal Supreme Court. Assuming, for the sake of argument, that
 392 the Seventh Amendment and the other constitutional limitations upon the power of the Federal Sovereign do not inhere in this creation of the Federal Sovereign, then the curious situation is presented of a creation of a constitutionally limited body, the Congress, administered by the agencies of that body freed from constitutional limitations, which agencies are in turn reviewable by a supreme tribunal constitutionally limited as is the Congress. Thus a cause of action, from its creation to the last step in administration, would be now restricted, now freed, and again restricted by the constitutional limitation of the Seventh Amendment.

Or, assume again, for the sake of illustration, that the Seventh Amendment does not inhere in every cause of action wherever tried, brought under the Federal Employers' Liability Act, then it would follow that the other amendments which are limitations upon the Federal Sovereignty do not inhere in the cause of action when administered in the courts of the several States. The due process clause, for example, of the Fifth Amendment would not inhere in the administration by the courts of the several States of this or any other cause of action created by Congress. Certainly, too, the due process clause of the Fourteenth Amendment, being by its terms a restraint upon the power of the State sovereignties, would not apply. Therefore, Congress can create a cause of action lacking in due process, adopting the agencies of the State courts for the administration of that action, and thus free the cause of action from

the constitutional limitation of due process, Federal or State. A construction of the constitutional limitations, Federal and State, which leaves such a gap, persuasively suggests that such an assumption is erroneous.

Stated in another way: If it is competent for Congress to confer authority on State courts to try cases arising under an Act of Congress, freed from the trammels of the Seventh Amendment, is it not also competent for Congress to confer authority on State courts to try any other classes of cases created by Congress, freed from the trammels of any of the provisions of the Constitution of the United States? Congress might even abolish the Federal courts, inferior to the Supreme Court, because Congress created them. And, by the same token, Congress might vest in State courts the exclusive power to try all cases created by Acts of Congress, and to try them freed from the trammels of the Constitution.

We have examined the Supreme Court cases cited by this court in the Kelly case, 161 Ky., on page 659, and also those cited by the Supreme Courts of Virginia, Minnesota and Oklahoma, in cases which, together with the Kelly and Stewart cases, *supra*, are now in the Supreme Court of the United States on writs of error from that court, on the proposition stated by this court in the Kelly case, that the Supreme Court has often declared that the Seventh Amendment "affects only trials in courts of the United States." None of the cases so cited is one involving the enforcement in a State Court of a cause of action created by an Act of Congress. All of those cases involved trials of causes created by the constitutions or statutes

of the States in which the causes were tried, or causes created by the common law. Manifestly, therefore, the question we have here was not presented, and could not have been presented, in any of those cases. In other words, the question we have here is *res integra*, so far as the decisions of the Supreme Court of the United States are concerned. Of course, everyone will concede that the Seventh Amendment is a restraint upon the Federal Government only, and not upon the States. This being so, it necessarily follows that where a cause of action is created by the Constitution or statute of a State, it is triable in the courts of that State in accordance with its laws, freed from the trammels of the Seventh Amendment, or any other of the first ten amendments to the Constitution of the United States. But it is a non sequitur that causes of action created by Congress may be so tried. Congress can create no cause of action which, either by its terms or in its administration in the courts, can escape the limitations imposed upon both Congress and the courts by any of the first ten amendments to the Constitution, including, of course, the Seventh Amendment, which preserves the right of trial by jury as at common law.

Again, it was said in the opinion in the Kelly case, "Congress did not in the legislation here in question attempt to attach any conditions to the practice and procedure through which the jurisdiction of State courts of competent jurisdiction might be exercised in the enforcement of rights arising under this act." In other words, the court, both in the opinion in the Kelly case and in its

subsequent opinions which discuss this question—and so do
 395 the other State courts which have decided the question adversely to our contention—treat the question of trial by jury as though it were merely one of procedure and not one of substance. We submit that the opinions of the Supreme Court have settled beyond controversy the proposition that the right to a trial by jury, in accordance with the Seventh Amendment, is not “mere matter of form and procedure but substance of right.” (Walker v. N. M. & Southern Pacific R. Co., *supra*, 165 U. S. 593, 596.)

In *American Publishing Company v. Fisher*, 166 U. S. 464, 468, *supra*, the Supreme Court said: “Whatever may be true as to legislation which changes any mere details of jury trial, it is clear that a statute which destroys this substantial and essential feature thereof (unanimity was in question) is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.”

And in *A. C. L. R. Co. v. Burnette*, 239 U. S. 199, the Supreme Court said of the Employers’ Liability Act: “In dealing with the enactments of a paramount authority, such as Congress, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont R. Co. v. White*, 238 U. S. 507.”

The objection has been made by the opponents of the argument that the Seventh Amendment inheres in jury trials in State courts of causes of action created by the Federal Employers’ Liability Act, that the *Fisher* and *Walker* cases, *supra*, and *Springville v. Thomas*, 166 U. S. 707; *Thompson v. Utah*, 170 U. S. 343, 350; *Black v. Jackson*, 177 U. S. 349, and *Rasmussen v. U. S.*, 197 U. S. 516, 526, were suits in territorial courts, and not in State courts, and that such territorial courts were substantially courts of the United States. But the Supreme Court has very definitely decided this question adversely to such contention. In *Good v. Martin*, 95 U. S. 90, the court said “Territorial courts are not courts of the United States, within the meaning of the Constitution.” Several previous decisions are cited in support of the holding, and there have been cases since then to the same effect.

See also *McAllister v. U. S.*, 141 U. S. on p. 183.

If, as we have shown, the right to trial by jury preserved by the Seventh Amendment is not a “mere matter of form and procedure but substance of right,” then the result of the argument under this heading may be summed up in syllogistic form as follows:

Major premise: The Seventh Amendment is a limitation of the legislative power of the Federal Sovereign;

Minor premise: The Federal Employers’ Liability Act is an exercise of that power;

Conclusion: The Seventh Amendment limits every cause of action created by the Employers’ Liability Act.

397 *II. But Congress Has Not Granted Jurisdiction of Cases under the Federal Employers' Liability Act to State Courts Which Do Not Answer the Requirements of the Seventh Amendment.*

The jurisdiction so far as the State courts are concerned under the Federal Employers' Liability Act was created by the Act of Congress of April 5, 1910, being an amendment to Section 6 of the Act of 1908, which amendment is as follows:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no cases arising under this act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

Referring to the same subject-matter, the Judicial Code (Section 28 of the Act of March 3, 1911), has this proviso:

"That no case arising under an act entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

The jurisdiction is conferred by the amendment of Section 6, *supra*, upon the Federal courts and the amendment then declares that this jurisdiction "shall be concurrent with that of the courts of the several States"; and again in the Judicial Code the State courts which have jurisdiction are referred to as "Courts of competent jurisdiction."

398 In the Second Employers' Liability Cases, 223 U. S. 1, this court said at pages 56-7:

"We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress, and susceptible of adjudication according to the prevailing rules of procedure."

Even if the view should be adopted, contrary to our contention, that jurisdiction of the State courts of cases under the Federal Employers' Liability Act of 1908 perhaps existed impliedly; nevertheless jurisdiction was expressly granted by the Act of Congress of April 5, 1910, amending Section 6 of the Act of 1908. The extent of the jurisdiction of the State courts is, accordingly, now defined and the State courts to entertain the jurisdiction are expressly designated by the Act of Congress.

It is perhaps not going too far to say that all of the agencies of the States are national for national purposes. As was said by the Supreme Court in the Second Employers' Liability cases, 223 U. S. 1:

"Congress, in adopting the Employers' Liability Act, spoke for all the people and all the States, and thereby established a policy for all."

In adopting the assistance of the courts of the several States for the administration of the Federal Employers' Liability Act
399 the Congress made those courts, when so acting, Federal agencies, subject to review by the Federal Supreme Court.

Concurrent jurisdiction means equal jurisdiction: *State v. Sinnott*, 89, Me. 41, 35 Atl. 1007. Again, concurrent jurisdiction has been declared to be a jurisdiction having the same authority: *Royer v. Bonair*, 2 Okla. 553, 37 Pac. 1078.

A competent court must be a court having all the attributes necessary to a constitutional trial. Thus in *Clarke v. Commonwealth*, 29 Pa. 129, the court held that a competent court for the trial of a person indicted must afford a panel of jurors constituted according to law and that such a panel was as necessary an ingredient as the presiding judge.

If it be suggested that uniformity of administration of the Federal Employers' Liability Act will be denied by withdrawing jurisdiction from State courts not able to afford a constitutional jury trial we might content ourselves with the answer that this argument ab inconvenienti has no bearing upon questions of constitutional power and statutory construction. We might, however, reply to this argument on its own plane by pointing out that only maladministration of this law can be brought about by verdicts of six jurors in Florida; seven jurors in Virginia; nine of twelve in Kentucky, Oklahoma and Ohio; five-sixths of the jury in Minnesota and Washington; and by the judge himself if the jury disagree in Louisiana. (*Walker v.*

Sauvinet, 92 U. S. 90.) What is to become of that "un-
400 animity" which "was one of the peculiar and essential features of trial by jury at the common law" which must inhere in every trial of an action at law under an Act of Congress (*American Publishing Company v. Fisher*, 163 U. S. 464, at page 468)?

Congress did not grant to State courts, unless concurrent and competent courts, the jurisdiction to entertain causes of action under the Federal Employers' Liability Act. A State Court which can not or may not require the unanimous verdict of a jury of twelve subject to control by the court as at common law is not a court designated by Congress to entertain such causes of action. Congress manifestly did not intend that the right of a plaintiff to recover under the act should depend on the fortuitous circumstances of his selection of the forum rather than on the principles of law declared by the Federal Constitution and by the act.

In disposing of this question in the case at bar, as shown by the quotation we have made from the opinion, the court says, in conclusion: "It might, however, be here further noticed that the verdict was agreed to by the full jury of twelve." If the court was without jurisdiction to try this case at all, because of the constitutional and statutory provisions of this State, referred to in the opinion, whereby the court was powerless to afford appellant a jury trial such as is guaranteed by the Seventh Amendment, of course, the mere ac-

cidental circumstance that the verdict is ostensibly the unanimous verdict of the twelve jurors does not affect the question. And the same result is reached if the question is considered from the viewpoint of the trial court's having the power to instruct the jury as requested by appellant that their verdict must be unanimous, and which instruction the court refused to give. (L. & N. R. Co., et al., v. Lang, County Judge, 160 Ky. 702; Same v. Wilson, et al., 165 Ky. 709.) It is not a question as to whether or not the jury who were told that nine or more of their number could make a verdict, ostensibly returned a unanimous verdict. They might not have done so if they had been instructed that all of them must agree before a verdict could be returned. The test is not what the jury did, but what the court told the jury they might do. We have elaborated this proposition in our arguments in some of the cases cited by the court in its opinion in this case. And we do not think it would serve any useful purpose to repeat the elaboration of the argument here.

III. *Excessive Damages.*

In its opinion the court has ratified the action of a jury in establishing a new high-water mark as to the amount of damages for compensation only which may be recovered in this State in an action for a death negligently caused. The matter is of such grave consequence to the employers of the State, that it seems to us it deserves a reconsideration at the hands of the court. As we pointed out in our original brief on this appeal, this court has never heretofore affirmed a judgment in a personal injury or death case for as much as the judgment in the case at bar, except in one instance (C. & O. R'y

Co. v. Johns' Admx., 155 Ky. 264), which was an action under the State statutes and in which both compensatory and punitive damages were authorized by the instructions given by the trial court and approved by this court. In affirming the judgment in that case the court took occasion to say that it was "unable to say that such an amount as we would approve for compensatory damages alone, when taken from the total amount of the verdict, would leave too high a sum for exemplary damages"; thereby clearly indicating that the court would not have affirmed the judgment for \$25,000 in the Johns case for compensatory damages alone. The Federal Act, under which this action was brought, limits the recovery to compensatory damages. And furthermore, it limits the recovery to the amount of pecuniary loss which the beneficiary sustained by the death. In other words, in the Johns case, under the State statute, the measure of compensatory damages was the loss which Johns' estate sustained by reason of his death. Whereas, here, the measure of damages is the pecuniary loss of which decedent's widow was deprived by reason of his death. The point of the suggestion is that the loss to the estate, under the Kentucky statute, is necessarily larger than the pecuniary loss of which the beneficiary has been deprived under the Federal Act. And yet, the court in this case has approved, for compensatory damages,

limited as indicated, a verdict for a very much larger sum than it has ever approved for compensatory damages in an action under the State statute where all of the damages which the estate sustained may be recovered. It is inconceivable that the Federal Act which

403 limits the recovery to the pecuniary loss of which the beneficiaries have been deprived could ever authorize a recovery equal to the amount which might be recovered for the same death under the statute of this State, much less a very much larger amount than has ever been so recovered and sustained by this court. We say this, independently of the question of the duty of the jury to diminish the damages in proportion to Holloway's contributory negligence, and upon the view, as stated by the court, that he was free from such negligence.

But, is not the court in grave error in holding that "there was sufficient evidence to warrant the jury in finding that Holloway while free from contributory negligence came to his death on account of the negligence of the flagman of the work train with which the engine Holloway was on collided." In making this statement, does not the court lose sight of the indisputable fact that Holloway ran his train from Fort Deposit to the place of accident, a distance of a little less than four miles, at the rate approximately forty-eight miles an hour, which was more than twice the rate of speed at which, by the time-table which is in evidence, he was authorized to operate the train between those points? If the finding of the jury means, as the court holds, that Holloway was not contributorily negligent, is not that finding so directly in the teeth of the evidence and so contrary thereto, as that the judgment entered on the verdict so returned by the jury should be set aside because it is not supported by sufficient evidence? (Civil Code, Section 340, Subsection 6.)

404 Again, the court refers to the instruction on contributory negligence as one "under which the jury was authorized, if they believed the deceased was guilty of such negligence, to diminish the amount of recovery according to the rule laid down in the instruction on this subject." The statute says nothing about a jury's being authorized to diminish the damages for contributory negligence. The statute says that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." (223 U. S. on page 8.) The statute does not vest in the jury a discretion as to whether or not they will diminish the damages in proportion to decedent's contributory negligence. It is mandatory upon the jury, where the evidence shows that the employe was contributorily negligent, not to allow full damages, "but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." (N. & W. Ry Co. v. Earnest, 229 U. S. 114, 122.) Inasmuch as the verdict in this case is the largest verdict that the court has ever affirmed for compensatory damages, of course it will not be contended that the jury diminished the damages in this case on account of Holloway's contributory negligence at all. This, in effect, the opinion concedes. There-

fore, we are squarely confronted with the question as to whether or not the jury, under the evidence in this case, were justified in finding that Holloway was free from contributory negligence, and that, therefore, the verdict should not be reduced by any amount whatever on that account. And we most earnestly contend that
405 in so finding, the jury's verdict is not sustained by sufficient evidence, but is contrary to the evidence; and that defendant is entitled to a new trial on that ground if upon no other.

And we further earnestly contend that the court, in holding that the pecuniary loss the widow sustained should not be limited to the amount required for her support and maintenance, and that, in addition thereto, she was entitled to be awarded one-half of decedent's prospective savings, if he had lived out his allotted span, gives a construction to the Federal statute which is diametrically opposed both to its letter and its spirit, and turns the jury loose into a realm of speculation. In providing, as the Supreme Court says is the meaning and purpose of the act, for a recovery "for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore, a liability for the pecuniary damage resulting to them and for that only," and in excluding a recovery for "loss of society and companionship, and of acts of kindness," because they "are not capable of being measured by any material standard," Congress evidently meant to allow the recovery of such damages only as were susceptible of measurement by a standard which existed at the time the employe was killed, and not to leave the jury to roam into the fields of speculation and conjecture as to the future. In establishing the standard of pecuniary loss of which the beneficiary had been deprived by the death, the statute, as the Supreme Court has

406 construed it, fixed a tangible, practicable standard for the measurement of damages. *Id certum set quod certum reddi potest.* But what standard has the jury to guide them in allowing damages for the loss of the prospective estate that the decedent might have accumulated if he had lived out his expectancy? Absolutely none! Every element going to make up a computation on that basis is purely conjectural and speculative. There is not the slightest assurance that decedent would have accumulated an estate if he had lived as long as the life tables say he ought to have lived. Even if he had saved part of his earnings he might so have invested them as that they would have been lost. His wife might not have lived as long as he, in which event, obviously, she would have had no pecuniary interest in the estate he might have left when he died. They might not always have lived together as husband and wife until the death of one of them dissolved the union. The verdict of the jury and the holding of the court as to this element of damages not only find no support in the statute, or the opinions of the Supreme Court construing it, but are contrary thereto, and they are also obnoxious to a settled principle of law that speculative and conjectural damages are too remote to be recovered for. And, yet, the opinion holds that the widow was entitled to recover as much on that account as she was on account of loss of support and maintenance.

In investigating this question in connection with the preparation of this petition for rehearing, our attention has been called, for the first time, to *Southern Railway Co. v. Hill*, 77 S. E. 803, 139 Georgia, 549, where the Supreme Court of Georgia decided this exact question in favor of our contention here. We quote the applicable portion of the opinion in the *Hill* case, as follows:

"Exception is taken to the charge respecting the measure of damages. The court instructed the jury 'that two elements enter into the assessment of damages under the Act of Congress: First, if the next of kin are dependent, and if the deceased contributed money to such next of kin, then the amount of such contributions, so far as the jury find that the next of kin would receive the same during the expectancy of the life of the deceased, are recoverable, and should be reduced to their present cash value; the second element entering into the recovery is that if the deceased had net earnings in excess of what was contributed to the next of kin, if anything was so contributed, then such net earnings in excess of this sum as the jury find the deceased would likely have earned during his expectancy of life, and would have accumulated at the time of his death, can be recovered, but you would also have to reduce them to their present cash value.' The evident purpose of Congress in enacting the Employers' Liability Act of 1908 was to give a right of action, in case of the death of the employe by wrongful act, to certain relatives dependent upon the employe, for the loss and financial damage resulting from his death. The distinction between the parties to sue and the parties to be benefited is made plain. The suit must be in the name of the personal representative of the deceased, but the recovery is not for the general estate of the decedent, but solely for the benefit of dependent relatives. *Am. R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879. The damages recoverable for the benefit of a surviving widow and children by the personal representative of the deceased employe are for the pecuniary loss which they sustain. 'There is no hard and fast rule by which pecuniary damages may be measured in all cases. A minor child sustains a loss from the death of a parent, of a different kind from that of wife or husband from the death of the spouse; while the former is capable of definite valuation, the latter is not.' 408

Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —. As was said by Lurton, J., in the opinion: 'This cause of action is independent of any cause of action which the decedent had, and includes no damages which he (the employe) might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.' *The jury were improperly instructed as to the estimation of damages. They were told that damages not only were recoverable for the benefit of the surviving widow and children, but, in case the net earnings of the deceased were in excess of this sum, that such excess was also recoverable by the administrator of the deceased em-*

ploye. Under the evidence this charge was harmful, and requires a new trial." (Our italics.)

So far as we are advised, the Hill case is the only one which has been decided under the act, in which this question has been discussed, except in the opinion of this court of which we are here asking a reconsideration.

While the Hill case differs from the case at bar in that there the jury were expressly told that they might find damages for excess earnings which Hill might have earned in his lifetime, whereas, in the case at bar, the jury were not expressly so told, the point is that this case was argued to the jury just as though the instruction as to the measure of damages had contained that which the Georgia court condemned in the Hill case, and the court recognizes in its opinion that such an argument was made and that it influenced the verdict.

In other words, the only way it is possible for the court
409 to arrive at the conclusion that the damages awarded in this case are not excessive is to approve of the action of the jury in allowing damages not only for the benefits the widow received from decedent in his lifetime, but also for her prospective benefits out of the estate he might have accumulated if he had lived out his expectancy.

There is nothing in the opinion of the Supreme Court in Southern R'y Co. v. Bennett, 233 U. S. 80, in conflict with that for which we are contending here. In that case there is nothing to show that the jury allowed anything on account of the conjecture that Bennett would have accumulated an estate and that his beneficiaries would have shared therein at his natural death, and that the jury allowed damages on that score. Furthermore, the Supreme Court, in the Bennett case, held that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error." But the question of excess is one for this court to deal with, under Subsection 4 of Section 340 of the Civil Code of Practice, and the opinions of this court construing that section. (L. & N. R. Co. v. Fox, 11 Bush, 495; Standard Oil Co. v. Tierney, 92 Ky. 367; Same case on second appeal, 96 Ky. 89; L. & N. R. Co. v. Creighton, etc., 106 Ky. 48; L. & N. R. Co. v. Brown, 127 Ky. 732; L. & N. R. Co. v. Reaume, 128 Ky. 90; Kentucky Wagon Mfg. Co. v. Shake, 137 Ky. 742; Louisville R'y Co. v. Minogue, 90 Ky. 369.) And the fact that the

Supreme Court seems to treat the question of excessive dam-
410 ages as one not of a Federal character, thereby making this court the final arbiter of this important question in this case, imposes upon this court the greater responsibility for exercising its undoubted jurisdiction to reverse the judgment because the damages are very excessive.

As to G. N. R. Co. v. Otos, 239 U. S. 349, cited in the opinion, it is sufficient to say that the amount of damages seems not to have been assigned as error, or considered by the court.

IV. The Judgment of Affirmance is in Error in Allowing Plaintiff Interest and Damages on the Judgment.

It has been expressly held that in an action under the Federal Employers' Liability Act, that act may not be so supplemented by State law as to authorize the affirmance of a judgment with damages and interest such as is authorized by the law of the State in which the case is tried. This question was directly ruled in *Norton v. Erie Railroad Co.* (Supreme Court of New York, Appellate Division), 148 N. Y. Supp. 771, the opinion in which reads as follows:

"The plaintiff seeks to have included in the judgment, interest upon the verdict from the time of the death of the plaintiff's intestate, as is provided by Section 1904 of the Code of Civil Procedure. I think that section has no application to this case, for the reason that the action is brought under the Federal Employers' Liability Act, and the verdict rests solely upon the claim arising under that act. The Federal statute is paramount and exclusive (Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp., 1911, p. 411 1322) as amended by Act, April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp., 1911, p. 1325); *Mondou v. N. Y. N. H. & H. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. —, reversing 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D, 276), and the defendant's liability may not be extended by the provisions of our statute. No provision is made in the Federal Act for adding such interest to the verdict, and I think the provisions of our statute may not be invoked for that purpose." Accordingly, an order denying plaintiff's motion for a retaxation of costs was affirmed.

See, also, *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 66, where the court said:

"We may not piece out this Act of Congress by resorting to the local statutes of the State of procedure or that of the injury."

Therefore, even if this petition for rehearing should be overruled in other respects, we ask the court to hold that the affirmance of the judgment does not carry with it either interest or damages, and that the mandate shall provide accordingly.

A rehearing is asked.

Respectfully submitted,

N. POWELL TAYLOR,
JOHN C. WORSHAM,
BENJAMIN D. WARFIELD,

Counsel for Appellant.

February 24, 1916.

Which petition was endorsed as follows: Filed, April 28th, 1916, Rodman W. Keenon, Clerk Court of Appeals.

And then again on the 9th day of May, 1916, the following
412 order was entered in the Court of Appeals of Kentucky:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOHN G. HOLLOWAY'S ADMR., Appellee.

Came appellee by counsel and filed response to the petition for rehearing.

The response referred to in the foregoing order is in words and figures as follows:

413 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD Co., Appellants,
vs.
JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

Response to Petition for Rehearing.

We do not deem it necessary to respond at length to the greater part of the argument presented in the appellants' Petition for Rehearing, as the main question discussed has been decided by the court adversely to the contention of appellant in several cases, and is expressly passed upon and decided in the opinion in this case. It has been so frequently discussed before this court, that we do not see that anything we might say would be of any assistance to the court, nor do we think the court needs any further light upon the question. The cases heretofore decided by this court are now pending in the United States Supreme Court, where they are to be heard with other cases from other states wherein the same question is involved, and we have been favored with a copy of the joint brief filed in that court, upon the question here involved. We attach to this response this
414 copy of the printed brief mentioned, in order that the court may have a full representation of the question before it, in the event it should desire to give it further consideration.

The only new question raised in the Petition for rehearing is developed on the last two pages of its printed Petition, and relates to the question of interest upon the judgment rendered, and the action of this court in awarding ten per cent damages upon the supersedeas bond executed by the appellant in accordance with the provisions of the Kentucky Code. In the brief presentation of this question, appellant cites and attempts to apply the case of Norton v. Erie Railroad Co., 148 N. Y. Supp. 771 and Michigan Central R. Co. vs. Vreeland 227 U. S. 59 to sustain its contention that interest and ten per cent damages should not have been awarded. We submit that neither of the cases have any application to the question here involved. There is no attempt here to piece out the Employers' Liability Act by resorting to the local statutes of the State.

In the Norton case it was attempted to assess interest on the damages recovered from the date of the death of plaintiff's intestate up to the date of judgment, whereas in the instant case the interest
415 is allowed only from the date the judgment was rendered. This is expressly authorized by Section 966, United States

Revised Statutes, which provides that interest shall be allowed on all judgments in civil cases in the Federal Courts at the same rate as is allowed by law on judgments recovered in the courts of the state in which the Federal Court is held, and Section 2220, Kentucky Statutes, provides that judgments shall bear interest at the legal rate from the date of their rendition.

The above statutes effectually dispose of the question of interest; but in this connection we may add further that the judgment in this case as rendered in the lower court carries the interest and no motion was ever made in that court to correct the alleged error with reference to interest. Manifestly, therefore, it is too late to raise the question now, for the first time, even if there were any merits in it.

The question raised as to the ten percent damages upon the supersedeas bond, while differing from the question of the interest is, we submit equally without merit. Section 747. Civil Code provides among other things:

416 "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued."

Section 748 provides that no supersedeas shall be issued until the bond especially provided for by that section is executed. The appellant was not required to execute this bond unless it desired to do so. It had a right to bring this case before this court for review without executing any bond. If it be true, as contended for by the appellant, that the Federal Laws and the method of procedure prescribed for the Federal Courts should prevail, then instead of executing the supersedeas bond and procuring a supersedeas to stay proceedings upon the judgment under the Kentucky Codes, it should have executed such bond, or taken such steps by injunction or otherwise, as is provided for to stay proceedings upon judgments in the Federal Courts. It did not do this, on the contrary it voluntarily went before the clerk of the lower court, executed the bond required by the state laws, and as a result obtained a stay of proceedings upon the judgment.

The appellant never offered in any way to proceed
417 under the the Federal laws to obtain a stay upon the judgment & never made any effort at all to enforce a stay according to Federal laws. It elected to prosecute its appeal and obtain a stay of proceedings pending that appeal under the Kentucky Statutes. Having made this election it is bound by its own action and liable for the penalties imposed by the law under which it acted. It is not even discretionary with this court as to whether or not the ten per cent damages shall be awarded. Section 764 of the Code is mandatory upon this court, and there was nothing it could do except to award ten per cent damages now complained of. If there ever was any merit in the contention that the Federal practice and method of procedure should be followed,—which there is not, the appellant has lost its right to complain by not following the Federal practice and by electing to proceed under the method prescribed by the laws of this state.

418 In addition to this there is, what appears to us, the uncontrovertible proposition, that while the right asserted in the present case arises under a Federal Statute, under which the

concurrent jurisdiction of the state courts is expressly recognized, the method of procedure as prescribed by the law of the state in which the action is instituted controls and governs the case from the time of its institution until it reaches if it does the Supreme Court of the United States.

Under our system of government each state possesses the inherent right to establish such courts for the administration of justice as the people of that state may desire and provide for, under their constitution. The right to establish the court is a sovereign right, and carries with it the right to prescribe the terms and conditions upon which those courts shall be open to litigants and the method of procedure to be followed. In the same way, the United

States may establish such courts as may be authorized
 419 by the Federal Constitution and prescribe the terms and conditions upon which they shall be open, and the method of procedure to be followed therein. No state either by legislative act or rule of court, can control in any way the procedure to be followed in any Federal Court; and in the same way and to the same extent, the United States, neither by act of Congress or rule of Court can control in any way the procedure to be followed in any state court. All this is true whether the right attempted to be enforced is a right asserted in a state court under a Federal law, or a right asserted in a Federal court under a state law. The only limitation upon this general rule is, that litigants in state courts, asserting Federal rights, shall be permitted to assert them on the same terms and conditions, with reference to form and procedure, that litigants are permitted to assert their rights under state law; and, in the same manner, litigants seeking the jurisdiction of the Federal
 420 courts for the enforcement of rights under state law must be permitted to assert those rights in the same way, with reference to procedure, that is permitted in the assertion of rights under Federal law.

In Kentucky, those forms of procedure are prescribed by our Code of Practice. The provisions of that Code prescribed the form of procedure necessary to be followed in prosecuting an appeal from any of the circuit courts to the court of appeals. The appellant had complied with those methods of procedure. The Code provides what steps shall be taken if the appellant desires not only to have the judgment reviewed, but to stay proceedings upon the judgment pending the appeal. It is only by complying with the provisions of that Code that the appellee could have been prevented from enforcing the collection of his judgment by compulsory process. The method of staying proceedings upon the judgments in the Federal courts has nothing to do with this case, nor is it necessary to inquire into what form of procedure are they required. This is a proceeding in a state court, properly brought in that court,
 421 and both parties, in conducting the case, are bound by the provisions of the Kentucky Code.

We might present, in this response a prolonged argument upon this question, but if we did it would be, to a very large extent, a re-argument of the first proposition with reference to a trial by

jury as prescribed by the law of Kentucky. The two questions are of a kindred nature, in that they involve questions of State practise and procedure. And, as stated in the beginning that question has been so often presented and passed upon, and is so thoroughly argued in the Joint brief above mentioned and attached hereto, that we do not feel it necessary at this time to prolong the discussion.

We respectfully ask that the Petition for Rehearing be overruled and a rehearing denied.

Respectfully submitted,

CLAY & CLAY,
Attorneys for Appellee.

422 We hereby acknowledge receipt of copy of above Response to Petition for Rehearing.

JOHN C. WORSHAM,
Counsel for Appellant.

May 5, 1916.

423 Supreme Court of the United States, October Term, 1915.

No. 321.

CHESAPEAKE & OHIO RAILWAY CO.

v.

KELLEY'S ADMINISTRATRIX.

No. 399.

ST. LOUIS AND SAN FRANCISCO RAILROAD CO.

v.

H. A. BROWN.

No. 453.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

SARAH DWYER, as Administratrix, etc.

473.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

GEORGE BOMBOLIS, Administratrix.

485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

v.

WM. H. STEWART'S ADMINISTRATRIX.

No. 743.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN.

424 *Joint Brief of Counsel for Defendants in Error on Enforcement of Rights Arising under Federal Employers' Liability Act in State Courts Whose Procedure Does Not Comply With the Seventh Amendment.*

Upon motion of plaintiffs in error, this court has directed that the above cases be heard together, because of the suggestion that there was one important question common to them all. For the convenience of the court, it has been thought conducive to clearness that the defendants in error should unite in this joint brief with relation to the fundamental question, without prejudice to any of the defendants in error who may prefer to present the points peculiar to their individual cases by separate briefs. Indeed it is appropriate that the court should be advised, in the out set, that some of the defendants in error will urge, by their separate briefs that the constitutional question was so raised or that the trial was so conducted in their individual cases as to render the same immaterial to favorable decision by this court in their individual cases presented, and, therefore, the attention of the court is expressly invited to the separate briefs of counsel for defendants in error.

425 (a) *Abstract of the Cases.*

In No. 321, The Chesapeake and Ohio Railway Company v. Kelley's Admr., the plaintiff in error has objected to the jurisdiction of the circuit court (for the first time by petitions for rehearing in Supreme Court of Kentucky) because under the laws of Kentucky, Kentucky statutes, section 2268, three fourths or more of the jurors may return a verdict, which has the same force and effect as if rendered by the entire panel. It affirmatively appears by the decision of the court of appeals of Kentucky and by the record in the case, however that the verdict was the unanimous verdict of a jury composed of twelve men.

In No. 399, St. Louis and San Francisco Railway Co., v. H. A. Brown, it is objected that the trial court erred in instructing the jury, in accordance with the state law, that nine jurors could return a verdict.

426 In No. 453, The Chesapeake & Ohio Railway Co., v Dwyer's Admr., the jurisdiction of the circuit court of Kentucky is attacked, by petition for rehearing in appellate court, on the ground that the verdict may be rendered under the state law of Kentucky by three fourths of the jurors. The petition was overruled without response.

In No. 473, Minneapolis, etc., R. Co. v. Bombolis, the jurisdiction

of the courts of Minnesota is attacked because five sixths of a jury of twelve may find a verdict.

In No. 485, Louisville & Nashville R. R. Company v. Stewart's Admr. to be considered with No. 904, Stewart's Admr. v. Said Railroad Company, by crosswrit the administratrix seeks to have reinstated a judgment rendered on the first trial, while — No. 485 the Railroad company seeks to have reversed judgment
427 entered on the second trial. The record of each trial affirmatively shows that the verdict was unanimous and rendered by a jury composed of twelve men.

In No. 743, C. & O. Ry. Co. v. Carnahan, the plaintiff in error, who was the defendant in the trial court challenged the array of jurors and moved to quash the venire facias, because it was not selected as required by the seventh amendment. The jury consisting of seven jurors impanelled under the law of Virginia, was, it is admitted, constituted in accordance with section 3166 of the code, of Virginia and the case could be tried in no other manner except for some peculiar reason. See opinion of Judge Cardwell, record Page 72.

(b) Statement of Contention of Plaintiffs in Error.

Thus in all these cases is presented the common question whether state courts in such of the states as have jury trials by fractional verdicts or by less than a common law jury, could take
428 jurisdiction of causes of action arising under the Employers' Liability Acts, or more broadly of causes of action arising under an act of Congress of the United States. It is insisted that the rights here asserted are federal rights created by the Congress of the United States, and can be tried only by the common law jury of twelve, required by the seventh amendment to the constitution.

Of course for purposes of this discussion only, it is assumed that the question is properly presented for determination by this court. In certain of the cases particularly No. 321 and 453 it is insisted by defendants in error that in as much as this proposition was not attempted to be presented until a petition for rehearing was offered after the Supreme court of the state had affirmed the judgment of the lower court, the question was not seasonably presented, i. e., at
429 a time when the lower court, could, if so minded, have accepted the view of the plaintiffs in error, or when the defendants in error could have protected his rights from loss by lapse of time. This point is elaborated in the separate briefs.

In the opinions in cases numbers 321, 399 and 743, this subject has received somewhat elaborate treatment from the courts of Kentucky, Oklahoma and Virginia, respectively and the discussion which follows is of course placed upon the soundness of the views there expressed, although as those opinions are a part of these records, it has not been thought wise to quote at length from them.

(c) Scope of Contention of Plaintiff in Error.

If this contention be sound, it follows that no Federal rights may be asserted in the courts of states whose procedure does not provide a jury of twelve men and require an unanimous verdict. Then the provisions of the Employers' Liability Act as amended by the act of April 5, 1910, section 6 to the effect that the Federal courts have concurrent jurisdiction and that no case brought in a state court shall be removed to a Federal court, are meaningless. And further the general provision of the Judiciary act regarding removals which recognize the jurisdiction of the state courts, are also meaningless for these state courts have, according to this contention, no jurisdiction to try any case.

And more startling still is the result that no court has jurisdiction to try cases where the amount involved is less than \$3,000.00. For the state courts are not according to this contention, competent and Federal courts have no jurisdiction over cases where the amount involved is less than \$3,000.00. This result is mentioned by District Judge Neterer in *Gibson v. Billingham and N. R. R. Co.*, 213 Fed. 488 and from it he well concludes that the contention is wholly at variance with the genius of the relation of federal rights and the judiciary of the states.

Furthermore as the objection is to the jurisdiction of the tribunal as not organized in accordance with the requirements of the federal constitution in the organization of courts of justice, not only the absence of a common law jury but other federal requirements will exclude the state courts from jurisdiction. The constitution Article III, section 1, requires that federal judges hold office during good behavior and protects them against diminution of salary during continuance in office. This feature of the Federal judiciary has been treated as very important. See the *Federalist*, No. 79, and opinion of Mr. Chief Justice Marshall in *Cohens v. Va.*, 6 Wheat. 264, page 386. It follows that a court whose judge holds office only for a limited number of years or whose salary is not as protected could try cases arising under the Federal laws. It would not be a court constituted as Federal courts under the constitution must be constituted.

It will thus be seen that the proposition here presented is very far reaching, in character, in defining the jurisdiction of state and Federal courts.

432

Argument Proper.

It is submitted that this contention is based on a mistaken view of the relation between rights created by the Congress of the United States and the judiciary of the United States. A right created by a sovereign is wholly independent of the judiciary of the sovereign. Other sovereignties recognize the right and enforce it according to the procedure of their own judiciary wholly without reference to the procedure of the judiciary of the sovereign creating the right. For instance a right created by statute of Massachusetts will be enforced

in Kentucky or Minnesota or Oklahoma or Virginia in accordance with the procedure of such courts. And the courts enforcing the right will not inquire whether in Massachusetts a jury of twelve is required 'as we are informed is the fact' or a jury of seven. The right is wholly independent of the judiciary, which is provided to enforce it. The question involved in the contention here presented by counsel for plaintiffs in error may be concretely put thus: Is it essential to the enforcement in a state court, of the federal law, that provisions of the federal constitution regarding the administration of law, be followed? Or, in other words, does the enforcement of a federal right differ from the enforcement of rights created by other sovereignties than the United States, in that it draws with it the necessity of enforcement in the manner prescribed by the Federal constitution for the administration of justice in Federal courts?

The discussion of this question involves the consideration of (1) the enforcement of federal rights in a state court and (2) the application of the seventh amendment to proceedings in a state court.

(1) *The Enforcement of Federal Rights in a State Court.*

(a) Federal rights are enforced in a state court as a subject of Litigation between parties before it.

Rights created by the Congress of the United States become a subject of litigation between parties and are enforced as a basis of liability in the same manner as are other rights subsisting between litigants. The United States is a sovereign possessing all the attributes of sovereignty, though exercising its sovereignty over a limited subject matter.

One of the attributes of sovereignty is the authority to create rights the obligations between persons amenable to its jurisdiction. Those rights once created in no way differ from rights created by any other sovereignty. It is true that owing to the peculiar relation between the national and state government, the national and federal government may exclude the state courts from the exercise of jurisdiction over federal right, but in the absence of such restriction, federal rights are enforceable in any court having jurisdiction of the parties.

In the Federalist No. 82, the relation of the state courts to rights created by the congress of the United States is thus explained.

"I do not mean, therefore, to contend that the United States in the course of legislation upon the objects intrusted to their direction, may not commit the decision of cases arising upon a particular regulation to the Federal courts, solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am of opinion that in every case in which they were not expressly excluded by the future actions of the national legislature, they will, of course take recognizance of the cause to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the

system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, although the causes of dispute are relative to the laws of the most distant parts of the globe. Those of Japan not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this we consider the state government- and the national governments as they truly are, in the light of kindred systems, and as parts of one whole the inference seems to be conclusive that the state courts would have concurrent jurisdiction, in all cases arising under the laws of the union, where it is not expressly prohibited."

In *Claffin v. Housman*, 93 U. S. (3 Otto) 130, 23 L. Ed. 833, 838, the court thus defined the relation of the state courts to federal laws:

436 "It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth*, 21 How. 506 (62 U. S. XVI. 169); and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

Mr. Justice Bradley then discusses the views presented by Alexander Hamilton in 82nd. number of the *Federalist* commending them. And he continues:

"These views seem to have — shared by the first congress in drawing up the judiciary act of Sept. 24, 1789, 1 stat. at L. 73 for, in distributing among the various courts created by that act, there is a constant exercise of the authority to include or exclude the
437 state courts therefrom, and where no direction is given on the subject it was assumed in our early judicial history that the state courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases."

In the second *Employers' Liability Cases*, (*Mondou v. N. Y., N. H. & H. Ry. Co.*) 223 U. S. 1, 56 L. Ed. 327, the court reviewing the action of the state court of Connecticut in refusing to enforce the act, because not in harmony with the policy of Connecticut, said:

"Because of some general observations in the opinion of the Supreme court of errors, and to the end that the remaining ground of decisions advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by
438 congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws to take recognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction as pre-

scribed by local laws, is appropriate to the occasion,' because we are advised by the decisions of the Supreme court of errors that the Superior courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant. * * *

We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion, but, be this as 439 as it may, it affords no reason for declining a jurisdiction conferred by law. The existences of the jurisdiction creates an implication of duty to exercise it, and this its exercise may be onerous does not militate against that implication."

These authorities explain very clearly how that rights arising in federal laws are enforced by State Courts. It is because they constitute a subject matter of litigation between the parties. The duty to enforce rights arising under law, arises, not in authorization from the legislation creating the rights, but in the scope of jurisdiction of the court granted to it by the legislature in constituting it. Rights arising under any law must be enforced in courts of general jurisdiction, not because the law creating the rights authorized its enforcement in that particular court, but because it is the nature of

courts to enforce rights. Else rights arising under the laws 440 of Massachusetts would not be enforceable in other states, for Massachusetts has no authority to legislate as to the enforcement of rights outside its borders. But such rights are enforced because the subject matter of litigation. The parties have come into court with certain rights subsisting between them, and it is the duty of the court as defined in its jurisdiction i. e., the scope of its cognizance, to determine the case, enforce the rights, whether emanating from the legislature of the state, the Congress, the legislature of a sister state or a foreign country. And this being true, it follows that cases involving rights created by Federal laws are to be enforced in the state courts in the ordinary, customary mode of procedure and in the method of trial prescribed by state laws.

But counsel for plaintiff in error insist that the enforcement of rights under Federal laws differ from the enforcement of laws of a foreign sovereignty in that Federal laws are the laws of the several states, and for that reason require enforcement agreeably to the method provided for Federal Courts. Brief pp. 7-10. The authorities above referred to and quoted, have not so viewed the matter. But we shall examine these contentions in detail.

441 (b) That Federal Laws are laws of the Several states does not change the nature of jurisdiction of the state courts.

Of course at this day no one would contend that Federal laws are not laws of the state. And because the federal laws are the laws of the several states, there arises this distinction in the manner of enforcement of federal rights from the manner of enforcement

of rights arising under foreign law, that in the former, proof of the law is not required nor is an inquiry into the policy of the law permitted, both of these features, however, apply to the latter. But this is the only distinction and it is not obvious how this distinction so affects the nature of state jurisdiction as to require enforcement there of the methods prescribed for Federal courts. It would seem that because federal laws are the laws of the state is the more reason why cases arising under them should be
 442 enforced in the same manner that obtains in the enforcement of other state laws.

The argument appears to be that as Federal laws are the law of the state, therefore State Courts in enforcing such law are Federal Courts. This might be true if rights arising under a statute could be enforced only in the courts of the sovereign creating the right. It might then be said that when state courts enforce Federal laws they take on the character of Federal court-. But courts enforce rights irrespective of their origin. It is not necessary to the enforcement of federal law that the court administering it be a Federal court. The Virginia Court in enforcing Massachusetts law does not become a Massachusetts court. Counsel overlooks the difference between legislative power and judicial cognizance. It is not essential to jurisdiction that the court exercising jurisdiction should be amenable to the authority of the sovereign creating rights on which jurisdiction is to be exercised. The duty of the courts of the states to enforce federal rights does not grow out of the responsibility to the federal government, nor is it a duty imposed by federal law. That duty is inherent in the nature of jurisdiction, and is derived from the state, though it relate to federal laws.

443 In Black's Law Dictionary we find jurisdiction defined thus:

The authority of a court as distinguished from the other departments; judicial power considered with reference to its scope and extent as respects the questions and persons subject to it; power given by law to hear and decide controversies. Abbott. "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them. 12 Pet, 657, 717."

And the nature of jurisdiction as dependent upon state law is brought out in the Mondou case, supra where Mr. Justice Van Devanter, says:

* * * "we deem it well to observe that there is not here involved any attempt by congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such court when its
 444 ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws to take cognizance of an action to enforce a right of civil recovery arising under an act of congress."

This duty to enforce the federal laws must be found in the jurisdiction "prescribed by local laws" for the court inquires and "is advised by decisions of the supreme court of Errors that Superior

courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for deaths * * * not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery * * * "

445 Perhaps in no case is the distinctiveness of the sovereignties, state and federal, in relation to their courts more clearly developed than in *Clafin v. Houseman*, supra, where Mr. Justice Bradley says:

"Every citizen of a state is a subject to two distinct sovereignties having concurrent jurisdiction in that state; concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights acquired under either system of law may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws, may be prosecuted in the state courts, and also, if the parties reside in different states, in the Federal courts. So rights whether legal or equitable under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class, subject, however, to this qualification, that where right arises under a law of the United States, congress may if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in the *Moses Taylor*, 4 Wall 429 (71 U. S. XVIII, 401) and Story, J., in *Martin v. Hunter*, 1 Wheat. 334, and Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236 (80 U. S. XX 634) * * * "

Here also the authority, i. e., the duty to determine, is said to arise in state law, for the inquiry is whether such court is "competent to hear and determine such kinds of rights and not restrained by its constitution in the exercise of such jurisdiction." And whether a court is competent is determined not by its methods of trial but by the scope of its jurisdiction as prescribed by local laws.

There is no blending of sovereignties in the enforcement of rights.

The duty to enforce arises in the nature of jurisdiction, in the function of the judiciary, not in the power to legislate.

447 Then the contention that, because federal laws are the law of the state, federal methods of trial governing the federal judiciary must be pursued in the enforcement of federal rights, falls. For the duty to enforce those laws arises, not in the federal law which created the right, but in the state law which constituted the court and defined its jurisdiction. It is because the federal rights are the subject matter of litigation that they are enforced in state courts, and they are to be determined as any other subject matter of litigation is to be determined in accordance with the usual methods, of trial obtaining in state courts.

This discussion cannot be better stated than in the words of Judge Neterer in *Gibson v. Bellingham and N. R. R. Co.*, 213 Fed. 488. In that case it was contended that a case brought in a court whose

procedure did not require an unanimous verdict could be removed to a Federal court as not being removed from a court of competent jurisdiction and therefore not within the clause of the Liability Act inhibiting removal.

448 Held: "It appears from the decisions of the Washington Supreme Court that the supreme courts may take cognizance for such injuries are brought and tried not only when the injury occurred within the state but where the right of action arose outside the state. In the latter event the right of the plaintiff to recover is determined by the laws of the state where his injury was sustained, but the rules of procedure and methods of trial employed are those of the tribunal whose aid is invoked. * * *"

There is no sound distinction why the principle should be different when a right of action created by a federal statute is sought to be enforced in a state court. The right of trial by a jury of twelve where the assent of all is necessary to a verdict, is but a method of trial prevailing in the Federal Courts, the fact that it is prescribed by the Federal Constitution does not change its essential character. It was intended to regulate the procedure of trials in the Federal courts, not to be annexed as a condition to the enforcement of a right of action. A state court of general jurisdiction may

449 enforce a right created by federal laws, where exclusive jurisdiction is not vested in the Federal courts. Not only is this true, but it is the duty of a state court to observe and enforce rights created by federal laws."

Thus it seems clear that Federal rights are enforceable in state courts because a subject of litigation between parties amenable to the jurisdiction of the state, and it follows that unless in some other feature of our coordinated system of government than in the fact the federal laws are the laws of the several states, federal methods of trial need not be provided in state courts for the trial of cases arising under federal law.

(c) Federal Rights are not enforced in State Courts by a delegated Authority from the Federal Government.

The authorities cited above show that the exercise of jurisdiction by state courts over cases arising under federal law is not based upon delegated authority but arises in the nature of courts of general jurisdiction. Moreover, the Congress cannot vest in state courts any judicial power of the United States.

That the Congress of the United States cannot vest judicial power in the courts of judicial officers of the several states has been recognized as settled since the decision in *Martin v. Hunter* 14 U. S. 1 Wheat. 304, 330, 4 L. L. Ed. 97, 103, when Mr. Justice Story said:

"Congress cannot vest portion of the judicial power of the United States except in courts of ordained and established by itself."

See *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715. In connection with the right of the supreme court on writ of error to the state court, to revise a judgment in the state court, it was argued that such right implied that the two systems must, under such a system be combined. But in *Cohens v. Virginia*, 6 Wheat., 264, 421, 5 L. Ed., 257, 295, wherein it was settled that an appeal might be prosecuted from the state court to the federal court,

this argument was discountenanced, and it was held that this right of appeal did not involve any change of view as to the source of authority of the state judiciary, or the federal judiciary, Mr. Chief Justice Marshall said (p. 421 L. Ed. p. 295):

"In opposition to it (construction permitting review of federal question by Federal court on writ of error) the counsel who made this point has presented in a great variety of forms this idea already noticed, that the federal and state courts must, of necessity and from the nature of the constitution be in all things totally distinct and independent of each other. If this can correct the errors of the courts of Virginia, he says it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

452 "But it has been already shown that neither of these consequences necessarily follow. The American people may certainly give to the national tribunal a supervising power over those judgments of the state courts, which may conflict with the constitution, laws, or treaties of the United States, without converting them into Federal courts or converting the national into a state tribunal. The one court still derives its authority from the state, the other still derives its authority from the nation." (Italics ours.)

And in *Martin v. Hunter*, 1 Wheat., 304, 342, 4 L. Ed. 97, 106, Mr. Justice Story said:

"It must therefore be conceded that the constitution not only contemplated but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was fore-seen that in the exercise of their ordinary jurisdiction, state courts could incidentally take cognizance of cases arising under the constitution and laws and treaties of the United States. Yet to all those cases the judicial power by

453 the very terms of the constitution is to extend. It can not extend by original jurisdiction if that was already rightfully and exclusively attached, in the state courts, which (as we have already shown) may occur it must therefore extend by appellate jurisdiction or not at all." (Italics ours.)

And Hamilton in the *Federalist* was of the same view, that the right of appeal to the Supreme Court would not affect the character of the jurisdiction of state courts over causes of action arising under federal laws. For in the 82nd *Federalist* he discusses both ideas, and after explaining the manner in which state courts would take cognizance of federal rights, as quoted above in this brief, page 7, further shows that the Supreme Court should, under the constitution, have appellate jurisdiction in the paragraph quoted in the brief of plaintiffs in error p. 27. Certainly it was not his view that state courts would take jurisdiction of causes of action growing out of the federal laws, by virtue of some delegated authority as federal agencies, because a right of appeal lay to the federal court. Had that been his view, he would hardly have argued that the state

454 courts take jurisdiction "from the nature of the judiciary power," in the same paper in which he argued that the Supreme Court, under the constitution, would have power to

review judgments of state courts. On the contrary this 82nd Federalist plainly shows that the appellate power in the Supreme Court does not involve any change in the nature or Constitution of the state courts.

It is true that the state courts, are, as Hamilton says "natural auxiliaries to the execution of the laws of the Union." For it was known that they existed throughout the United States, and under the law would be open to the adjudication of causes involving federal laws. But as has been shown, that fact does not imply that they exercise a delegated authority. It is only by delegated authority that the provisions of the seventh amendment can be made applicable to state courts.

The act in question (Employers' Liability Act) in its own terms shows that the jurisdiction of the state courts is not a delegated jurisdiction. It recognizes an independent jurisdiction in
455 state courts. It confers jurisdiction on the federal courts.

The Paynter amendment is as follows:

Section 6. * * * "The jurisdiction of the courts of the United States, under this act, shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The clause inhibiting removal is a limitation on the jurisdiction of the Federal courts. The clause relating to jurisdiction of state courts is a mere recital and the language could hardly be construed as a mode of expressing a grant of jurisdiction, especially as in the same clause is an express grant of jurisdiction to Federal courts. If it had been the purpose of Congress to grant jurisdiction to state courts, the simple phrase, "United States courts and state courts shall have jurisdiction" would have sufficed. So that if state courts take jurisdiction over Federal rights only by delegated authority, it might be appropriately urged that they have no jurisdiction over
causes of action arising under this act.

456 But it has been repeatedly recognized, it is part of our jurisdiction that state courts take jurisdiction of all causes of action arising under federal laws, unless that jurisdiction has been excluded.

To illustrate: Copyrights are created by laws of the United States. Rights arising under the National Banking Act are likewise created by Congress. Yet the state courts enforce them, in the latter case, exclusively so far as their federal creation are concerned.

The Interstate Commerce legislation of Congress covers a wide and constantly widening field. Among its many provision-creating entirely new rights and personal liabilities are the Safety appliance acts and amendment of 1906, known as the Carmack Act.

And the courts have taken jurisdiction in all such cases, without reference to any express or implied grant of jurisdiction. See *C. N. O. & T. P. R. R. Co. v. Griggs*, Ky. 80 S. W. 512 (not officially

reported); Ill. Central R. R. Co. v. Curry, 127 Ky., 643;
 457 Ill. Central R. R. Co. v. Eblin, 114 Ky. 814; McElvain v.
 S. L. and S. F. R. R. Co. (Mo.) 131 S. W. 736; West Union
 Tel. Co. v. Bilisoly, 116 Va. 562. So. Ry. Co. v. Jacobs, 116 Va. 189.
 L. & N. Ry. Co. v. Scott, 133 Ky. 724, affirmed 219 U. S. 209; 55
 L. Ed. 183 and of course they must do so, as has been held in
 Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 48, 58
 L. Ed. 838; Kansas City Western Ry. Co. v. McAdow, Adv. Ops.
 1915 p. 252.

Thus we see that Congress instead of conferring jurisdiction on
 the state courts, recognized that they already had, or would have
 such jurisdiction without express federal consent. There is no
 necessity for seeking a delegated authority to explain the propriety
 of the jurisdiction of the state courts. The state law will be en-
 forced in Federal courts in cases where Congress has created a
 jurisdiction suitable to such cases; (Greely v. Lowe, 155 U. S. 75);
 rights arising under a statute of Tennessee or an act of Parliament
 will be enforced in the courts of the Kentucky and every other
 state. In none of these cases does the sovereignty creating the
 right confer jurisdiction. For the state court can not confer
 jurisdiction on a Federal court, nor could the legislature of Ten-
 nessee or the Parliament of Great Britain confer the jurisdiction
 on the courts of Kentucky. Yet this jurisdiction is uni-
 458 versal, not as a matter of friendly interchange of courtesy,
 but as a duty arising in the common law of jurisdiction.

The Analogy Between Territorial Courts and State Courts.

That the provisions of the Seventh Amendment are applicable to
 the judiciary of the territories, and the District of Columbia does
 not know that those provisions must be followed in state courts, in
 trying case involving federal laws. The United States has created
 those courts by virtue of its authority as sovereign of the territory
 and of the District. But the United States has not created state
 courts. The reason the Seventh Amendment applies to the territo-
 ries and the District is that the United States is sovereign and the
 Seventh Amendment is binding upon the United States in creating
 its judiciary. The reason does not lie in the fact that the courts of
 the territories are enforcing federal law.

In Capital Traction Co. v. Hof., 174 U. S. 1, 5, 43 L. Ed. 873, 874,
 it is said:

The Congress of the United States being empowered by the consti-
 tution to exercise exclusive legislation in all cases whatsoever over the
 seat of national government, has entire control over the District of
 Columbia, for every purpose of government, national or local.
 459 It may exercise within the District all legislative powers that
 the legislature of a state might exercise within the state and
 may vest and distribute the judicial authority in and among the
 courts and magistrates and regulate judicial proceedings not contra-
 vene any provision of the Constitution of the United States.

In *Thompson v. Utah*, 170 U. S. 343, 348, 42 L. Ed. 1061, 1066, wherein it is held that the provisions of the constitution regarding trial in criminal prosecution apply to territorial courts, quotes from *Murphy v. Ramsey*, 114 U. S. 15, 44, thus:

"The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to which all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms."

460 And in *Am. Ins. Co. v. 356 Bales of Cotton* (26 U. S.) 1 Pet. 511, 546, 7 Ed., 242, 256, it is said:

"These courts, then, are not constitutional courts in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts created in virtue of the general right of sovereignty which exists in the government or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It is of course true, as said in the case last cited, as well as in the other cases cited on this point in brief of Plaintiffs in error, that "territorial courts are not courts of the United States within the meaning of the Constitution." But it is also true that they are not state courts. That the Seventh Amendment is applicable to trials in territorial courts does not lead to the conclusion that it is also applicable to trials in state courts unless the two kinds of court have in common the feature on which the applicability to territorial courts is based. That feature is that Territorial courts are created by the United States, and the Amendments to the Constitution are binding upon the
461 the United States in the organization of a judiciary in territory incorporated into the United States. But that feature is wholly absent in the organization and exercise of jurisdiction by state courts. Territorial courts are genuine federal agencies for they are created by the United States for the government of the territory. State courts are not federal agencies for they are not created by the United States and do not exercise their jurisdiction in the United States territory. It is not the subject matter of the litigation, the *casus fœderis*, in the phrase of counsel, which renders applicable the Seventh Amendment, but the constitution of the court, and its territorial jurisdiction over United States land. For in all classes of cases the courts of the territories are obliged to pursue the method of trial prescribed in the Amendment. If the subject matter determined the application of the Seventh Amendment then territorial courts would be obliged to adopt that method only in those cases which involved federal rights. The analogy is thus seen to be wholly inapt.

Thus it will be seen that state courts take cognizance of these cases not by the authority of the enacting power, but in the exercise of their general jurisdiction, in the same manner in which they
462 take cognizance of the laws of New York or Great Britain. The only differences are that it is not necessary to prove the

law as a foreign law because it is not a foreign law, and the state courts can not enter into a consideration of the relation of the laws to the policy of the state, as they may do in the case of strictly foreign laws.

As the state courts recognize and give effect to the federal laws as forming foundations for litigation between persons amenable to their jurisdiction, it follows that the procedure of the state courts is in accordance with the law of the state. The litigation is determined under the procedure provided by the state.

Therefore, unless inhibited by the provisions of the constitution or laws of the United States, the state courts may enforce the Federal laws according to procedure provided by the state, without reference to the provisions of the federal law relative to procedure in Federal courts. The inquiry regarding that inhibition is our second question.

463 2. *The Application of the Seventh Amendment to Proceedings in a State Court.*

(a) The Seventh Amendment Applies to the Federal Judiciary not to Federal rights.

The Constitution proper contains nothing which by any possibility could be construed as an inhibition on the state courts, or as prescribing the procedure to be adopted in enforcing federal rights. The seventh Amendment was proposed to the several legislatures by an act of Congress passed at the First Congress, Sept. 25, 1789. This was the day following the passage of the Judiciary Act creating federal tribunals inferior to the Supreme Court. This act of Sept. 24, 1789 first created trial courts. Until then, federal laws, were of course, enforceable solely in the state courts. On the day following the act subsequently embodied in the first ten amendments, was passed. This is a very significant fact in determining the application of the Seventh Amendment to State courts, whether they are taking cognizance of federal or state laws. For it necessarily requires the inference that it was made necessary by the creation of federal trial courts, and applies to them only.

464 In *Barron v. Baltimore*, 7 Pet. 242, 8 L. Ed. 672, 674, 675, the application of these amendments to the state was first considered. The court speaking by Marshall C. J. said of the Fifth Amendment:

"The constitution was ordained and established by the people of the United States for themselves for their own government and not for the government of the individual states. Each state established a constitution for itself and in that constitution provided such limitations and restrictions on the powers of its particular governments as its judgments dictated. The People of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power if expressed in general terms are naturally, and we think, necessarily applicable to the gov-

ernment created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

465 After discussing the language of the amendments, Mr. Chief Justice Marshall continues:

"Had the people of the several states or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments the remedy was in their own hands and would have been applied by themselves. A Convention would have been assembled by the discontented states and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of Congress and the assent of three-fourths of their sister states could never have occurred to any human being as a mode of doing that which might have been affected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution and have expressed that intention. Had Congress engaged in that extraordinary occupation of improving the constitution of the several states by affording the people additional protection from the exercise of power by their own governments in matters 466 which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

"But it is universally understood, it is part of the history of the day, that the great revolution which established the constitution of the United States was not affected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted amendments to guard against the abuse of power were recommended. These amendments demanded security against apprehended encroachments of the general government, not against those of the local government."

Walker v. Sauvinet, 2 Otto (92 U. S.) 90, 23 L. Ed. 678, 679, presented the counterpart of Slocum v. N. U. Life Ins. Co. 228 U. S. 364, so much relied on by counsel (brief pp. 17 and 19). In Walker v. Sauvinet was involved the validity of a judgment in a state court entered by a judge without a verdict, in accordance with a statute of Louisiana permitting judgment without a verdict in case the 467 jury failed to agree. The Slocum case presented similar facts but trial had been in Federal courts. Mr. Chief Justice Waite said:

"This (Seventh Amendment) as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall., 557. The states so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is

not, therefore, a privilege or immunity of natural citizenship, which the states are forbidden by the 14th amendment to abridge. A state can not deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken, etc., Co.*, 18 How., 280, 15 L. Ed. 276. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.

Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI Constitution. Here the state court has decided that the proceedings below was in accordance with the law of the state, and we do not find that to be contrary to the constitution or any law or treaty of the United States."

In *Brown v. N. J.*, 175 U. S. 172, 44 L. Ed., 119, 120, where was called in question the constitutionality of the law of New Jersey providing a "struck" jury in felony cases, Mr. Justice Brewer said:

"The first ten amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal Government. (Citing many cases.) The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. * * * The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed—at the common law. Subject to the limitations hereinbefore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

469 In *Maxwell v. Dow*, 176 U. S. 581, 44, L. Ed. 597, the validity of a verdict of a jury of eight in a felony case came under review. The court said:

"In order to limit the powers which it was feared might be claimed or exercised by the federal government under the provisions of the Constitution as it was then adopted, the first ten amendments to that instrument were proposed to the legislature of the several states by the first Congress on the 25th of Sept., 1789. They were intended as restraints and limitations upon the powers of the general government and were not intended to, and did not have any effect upon the powers of the respective states. This has been many times decided. The case herewith cited are to that effect and they cited many others which decide the same matter. *Spies v. Illinois*, 123 U. S. 131, 166, 31 L. Ed. 80, 86, 6 Sup. Ct. Rep. 21; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383, *Brown v. New Jersey*, 175 U. S. 172, 174, (ante, 119) 20 Sup. Ct. Rep. 77.

* * * These cases show the meaning which the courts have attached to the expression as used in the Fourth article of the constitution, and the argument is not labored which

gives the same meaning to it when used in its fourteenth amendment.

"That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions. But, as said in the Slaughter House Cases, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 wherein it is said that sovereignty for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase "privileges and immunities" of citizens of the United States, which the states by reason of the 14th Amendment
471 can not in any manner abridge, then the sovereignty of the states in regard to them has been entirely destroyed, and the Slaughter House cases and United States v. Cruikshank are all wrong, and should be overruled.

See also *Pearson v. Yewdell*, 95 U. S. 294; *Ohio v. Dollison*, 194 U. S. 447; *Bollin v. Nebraska*, 176 U. S. 87, affirmed, 51 Neb. 581; *Brown v. Walker*, 161 U. S. 606; *Monongahela Nav. Co. v. U. S.* 148 U. S. 324; *McIlvaine v. Bush*, 142 U. S. 158. *Eilenbecker v. Plymouth County*, 134 U. S. 34; *Spies v. Illinois*, 123 U. S. 131; *Edwards v. Elliott*, 21 Wall. 552; *Justices v. Murray*, 9 Wall., 227; *Fox v. Ohio*, 5 How. 410 and *Livingston v. Moore*, 7 Pet. 551.

These cases put it beyond controversy that the seventh amendment does not apply to proceedings in the state courts. This general ruling does not except trials in state courts enforcing federal rights.

It is inconceivable that careful, accurate thinkers should not
472 have noted this exception had it existed. But on what can such an exception be based? That seventh amendment is general. It applies to all trials. If applicable to the trial of federal rights it is equally applicable to trials of state rights. It provides "in suits at common law where the value, etc., the rights of trial by jury shall be preserved." It would certainly be an unwarrantable construction to interpret this language as applicable to any class of trials other than all trials. Yet it is just this exception which counsel for plaintiffs in error seek.

Moreover, if the seventh amendment applies not to a judiciary, for the federal judiciary, but to the cause of action, the *casus fœderis*, then we have an entirely new line of demarcation throughout. As it would apply to state courts only in cases where federal rights are involved, it would apply to Federal courts only when federal rights are involved. Its application can not be predicted on the character of the judiciary in some cases and on the subject matter of the litigation in others. It is general in its terms, and if it has to do not with the courts but with the case, it would restrict the mode of trials
473 in Federal courts only when a case arising under the constitution and laws of the United States was being tried. And the interpretation given it, throughout the century, is all wrong. It has not accomplished its purpose in guarding rights tried in Federal courts and it operates to regulate the mode of trial in state courts.

Yet to this result, the contention of counsel that the subject matter of the litigation governs the application of the seventh amendment necessarily, as it seems to us leads.

The seventh amendment by its terms is directed to a judiciary. It restricts the mode of administration of law, all law, in all classes of cases. If it does not apply to the state courts, in any class, it applies in none.

(b) The Seventh Amendment is a Limitation on the Organization of the Federal Judiciary, Not a Limitation on Legislation Creating Rights.

It would seem that the contention of Plaintiffs in error is suggested in the fact that Congress can not give a remedy for the enforcement of rights created by it except it provide a jury of twelve. The Seventh amendment would prevent a law of congress providing that this right should be tried in a Federal court before a jury of seven or a verdict other than unanimous. And from this, it is argued that the right is not enforceable in the state courts, 474 except by a jury of twelve likewise. But there is a confusion here. Rights are created irrespective of the judiciary. A limitation on the administration of law is not a limitation on the law. To illustrate: The constitution of Virginia requires in jury trials, a jury of not less than seven. But in an action in another state, wherein rights arising under Virginia statutes are asserted, the procedure need not follow the law of Virginia in reference to jury trials. Yet a Virginia Statute could not create a right cognizable at common law which should be tried in her courts otherwise than by a jury of not less than seven. Again, in an action in Virginia to assert rights arising under the law of Massachusetts where the jury must consist of twelve men, the procedure is in accordance with the law of Virginia. Yet, that right if enforced in Massachusetts must be tried by a jury of twelve. The constitution protects and regulates the administration of law within the state; it does not undertake to define and determine how rights shall be tried. The distinction is between legislation and administration through a judiciary. Legislation may exist without a judiciary. It is not inconceivable that rights should be created by a sovereign and yet no judiciary exist for the enforcement of those rights. Indeed such was the case of a government of the United States in its inception.

It had no trial judiciary, yet rights created by its legislation 475 were cognizable in the state courts. The constitution of the United States has prescribed certain regulations for the procedure in the courts of the United States just as the constitutions of the several states have prescribed certain regulations for the procedure of their courts. But legislation on the rights and duties of those within its jurisdiction is not hereby limited. There is nothing in the constitution of the United States which requires that a federal law should be enforced in a specific way. That constitution prescribed the way in which all litigation over which its courts take jurisdiction shall be conducted.

It is hard to believe that the supreme court speaking through Mr. Justice Van Devanter in the second Employers' Liability cases, supra, in holding that the right of the state courts of general jurisdiction

to enforce this law created an application of duty to enforce it, intended that this holding should be restricted to courts of states providing the common law procedure in regard to juries. Especially as the court must have been well aware that in many, if not in a majority of states, the common law jury is not provided and it had occasion to pass upon the administration of law by the several states when that objection was raised, as in *Maxwell v. Dow*, Walker v. Sauvinet, *Barron v. Baltimore* and numerous other cases, cited above. It is submitted that no such restriction on the act is warranted or tenable.

Conclusion.

From this discussion it is submitted that: Federal rights are recognized and enforced in the state courts as are any other rights which form the basis of a litigation, whether arising out of state or foreign law. The constitution of the United States contains no prohibition to the enforcement of these rights in the state courts, in accordance with the usual mode of procedure. The seventh amendment is a limitation on the administration of law in the Federal courts, not a limitation on the conduct of litigation, on whatever rights based, in the state courts. Its phraseology, its history and the construction adopted by the courts all sustain this view.

Respectfully submitted,

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Appendix.

Cases and Textwriters and Reviews which have considered this contention.

Winters v. Minn. & St. L. Ry. Co. 126 Minn. 260; 148 N. W. 106.

Chesapeake & Ohio Ry. Co. v. Kelley's Admr., 161 Ky. 655, 171

S. W. 185. In this court No. 473.

478 Louisville & N. Ry. Co. v. Winkler (Ky.) 173 S. W. 151.
 Minneapolis & St. Louis Ry. Co. v. Bombolis (Minn.) 150
 N. W. 385. In this court No. 473.

St. Louis & San Francisco Ry. Co. v. H. A. Brown (Okla.) 144
 Pac. 1675. In this court No. 399.

Chesapeake & Ohio Ry. Co. v. A. P. Carnahan (Va.) 86 S. E. 865.
 In this court No. 743.

Gibson v. Bellingham & N. Ry. Co. (Dist. Court Wash.) 213
 Fed. 458.

Columbia Law Review, Vol. XV, No. 7, page 616.

Virginia Law Review, Vol. III, No. 4, page 312.

Virginia Law Register, Vol. I, N. S. No. 11, pages 721, 734.

All of which authorities have expressed the view that state courts,
 whether providing a common law jury or not, may take jurisdiction
 of cases involving federal rights and determine the case in accord-
 ance with their usual and customary methods of trial.

Which response is endorsed as follows:

Filed, May 8th, 1916. Rodman W. Keenon, Clerk of the Court
 of Appeals of Kentucky.

479 And then again on the same day of said Court of Appeals
 of Kentucky, to-wit: May 9th, 1916, the following order was
 entered herein:

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,

vs.

JOHN G. HOLLOWAY'S ADMR., Appellee.

Come appellant by counsel and filed reply to appellee's response
 to appellant's petition for rehearing, with notice.

The reply referred to in the foregoing order is in words and figures
 as follows:

480 Court of Appeals of Kentucky, Winter Term, 1916.

No. 34.

*Appellant's Reply to Appellee's Response to Appellant's Petition for
 Rehearing.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

versus

JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

Appeal from the Henderson Circuit Court.

In addition to Norton v. Erie Railroad Co., 148 New York Supple-
 ment, 771, cited and quoted from in our original petition, we call the
 court's attention to Mabel L. Griffin, Administratrix, v. The New

York Central & Hudson River Railroad Company, decided by the Supreme Court of Onondaga County, New York, January 22, 1916, and which opinion, so far as we know, has never yet been printed, but a typewritten copy of which is hereto attached, in which, in a suit under the Federal Employers' Liability Act, the Supreme Court denied a motion to restore to the bill of costs originally filed an item of One Thousand One Hundred Twenty-five Dollars (\$1,125), representing interest on the verdict, under the Federal Employers' Liability Act, from the date of the rendition of the verdict.

481 This makes two New York cases which have been decided under the Act, which sustain the proposition for which we contend in our petition for rehearing in this case.

This question was presented to the Supreme Court of the United States in the brief and oral argument for Plaintiff in Error, in Louisville & Nashville Railroad Company v. Stewart's Administratrix, being one of the six cases covered by the briefs on both sides, in which the brief for the Defendants in Error in those cases is attached to and made part of appellee's response to the petition for rehearing in this case. Those cases were argued in the Supreme Court of the United States on April 19 and 20, and may be decided at any time. They will almost certainly be decided before court adjourns the latter part of this month or early in June for its summer vacation. We will then know whether there is anything in either the Seventh Amendment Question or this question of the right of a State court, in affirming a judgment rendered in an action brought under the Federal Employers' Liability Act, to impose a penalty of ten per cent (10%) damages and interest on the judgment. Until the Supreme Court does speak on these questions, one opinion is as good as another, as to what the law is with respect thereto.

Respectfully submitted,

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JOHN C. WORSHAM,
BENJAMIN D. WARFIELD,

Counsel for Appellant.

May 6, 1916.

(See opinion next attached.)

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(Copy.)

At a Special Term of the Supreme Court, held in and for the County of Onondaga at the Court House in the City of Syracuse, N. Y., on the 22nd day of January, 1916.

Present: Hon. William H. Andrews, Justice Presiding.

SUPREME COURT,

Oneida County:

MABEL L. GRIFFIN as Administratrix of the Goods, Chattels and Credits of Michael Griffin, Deceased, Plaintiff,
against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The plaintiff having moved this Court for an order directing the Clerk of the County of Oneida to restore to the Bill of Costs originally filed by the plaintiff in the above-entitled action the item struck therefrom on the retaxation of said costs, amounting to eleven hundred and twenty-five dollars (\$1,125.00) representing interest on a
483 verdict from the date of its rendition by the jury in plaintiff's favor, down to the time of the entry of judgment thereon in the above-entitled action, and which verdict was recovered by the plaintiff under and by virtue of the provisions of the Federal Employer's Liability Act, so-called, being Act of April 22, 1908, chapter 149, 35 Stat. 65, as amended April 5, 1910, by Ch. 143, 36 Stat. 291, and which said item of interest was stricken by the Clerk of Oneida County from plaintiff's Bill of Costs on defendant's written objection filed with the Clerk on the re-taxation of said costs, that such item of interest was not properly taxable by the Clerk because plaintiff's verdict was obtained and her recovery had under the provisions of the Federal Employers' Liability Act; and the plaintiff's said motion having come on for argument, and on the Court's questioning the propriety of the practice of including interest in the Bill of Costs, instead of adding it to the verdict, it was then and there stipulated in open court on the argument by the respective counsel, and with the Court consenting thereto, and in order to have the entire question of allowing interest on this verdict and judgment obtained under the Federal Employers' Liability Act determined on its merits, on this motion, that this motion with the consent of the Court be considered
and decided by the Court as a motion to add interest to plain-
484 tiff's verdict from the date of its rendition thereon and that said judgment shall bear interest from the date of its entry and while said judgment remains unsatisfied and in full force and effect;

Now, on reading and filing said notice of motion dated December 20, 1915, the affidavit of Wordsworth B. Matterson verified the 20th day of December, 1915, the affidavit of Daniel E. Meegan verified

the 21st day of January, 1916, and on plaintiff's Bill of Costs filed in Oneida County Clerk's office on the 27th day of November, 1915, and on plaintiff's judgment entered in Oneida County Clerk's office on the 27th day of November, 1915, and on defendant's written objections to plaintiff's Bill of Costs filed in Oneida County Clerk's office on the 6th day of December, 1915, and on all the papers and proceedings had in this action, and after hearing Wordsworth B. Matterson of counsel for plaintiff in support of said motion, and Daniel E. Meegan of counsel for defendant, in opposition thereto and briefs being thereafter submitted by counsel for the respective parties, and due deliberation having been had thereon, on motion of Kernan & Kernan, attorneys for the defendant, it is

Ordered, That Plaintiff's said motion be and the same is hereby *is*, in all respects, denied, upon the merits with ten dollars (\$10) costs of this motion granted to the defendant.

485

W. H. A.
J. S. C.

Enter in Oneida County.

Said Response is endorsed as follows, Filed May 8th, 1916, R. W. Keenon, C. C. A.

486

And then again on the 11th day of May, 1916, there was entered in the Court of Appeals of Kentucky the following order, to-wit:

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,
vs.

JOHN G. HOLLOWAY'S Adm'r, Appellee.

The court being advised, the petition for re-hearing in the above case is overruled.

487

Be it remembered that on another day, to-wit: May 12, 1916, the Court of Appeals of Kentucky entered the following order:

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,
vs.

JOHN G. HOLLOWAY'S Adm'r, Appellee.

Came appellant by counsel and filed motion for time to June 15th to perfect writ of error and to stay the issual of mandate until said date.

Said motion being submitted to the Court, the same is sustained and time extended to June 15th, for the purpose of permitting the appellant to perfect writ of error for the Supreme Court of the United States, and the issual of mandate in this case is stayed until said time.

The motion referred to in above order is in words and figures as follows:

- 488 *Motion for Time to Perfect Writ of Error from the Supreme Court of the United States.*

Court of Appeals of Kentucky, Winter Term, 1916.

No. 34.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
JOHN G. HOLLOWAY'S ADMINISTRATOR, Appellee.

Appeal from Henderson Circuit Court.

Comes appellant, Louisville & Nashville Railroad Company, and moves the Court to extend the time in which for appellant to perfect its writ of error from the Supreme Court of the United States in this cause until June 15, 1916, and the issual of mandate is stayed until said date.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,
By BENJAMIN D. WARFIELD, *Its Attorney.*

Said Motion is endorsed as follows: Filed May 11th, 1916. R. W. Keenon, C. C. A.

488½ Be it remembered that on the 13th day of June, 1916, the appellant, Louisville & Nashville Railroad Co. now plaintiff in error filed with the Clerk of the Court of Appeals of Kentucky its petition for writ of error, which is in words and figures as follows:

- 489 UNITED STATES OF AMERICA, ss:

Commonwealth of Kentucky to the Honorable Warner E. Settle, Acting Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Louisville & Nashville Railroad Company, respectfully shows that on the 3rd day of February, 1916, the Court of Appeals of Kentucky rendered a judgment against your petitioner in a certain cause to recover damages for the death of one of your petitioner's employees, which occurred May 14th, 1912, and in which cause your petitioner was appellant, and E. S. Holloway, as administrator of the estate of John G. Holloway, deceased, was appellee, affirming the judgment of the Circuit Court of Henderson County, Kentucky, wherein said E. S. Holloway, as administrator, aforesaid, was plaintiff, and your petitioner was defendant, as will appear from the record of the proceedings in said cause. And your petitioner further shows that subsequently, and in due time, it filed in said Court of Appeals of Kentucky its petition for a rehearing,

and that on May 11, 1916, said Court overruled said petition for rehearing; and your petitioner further shows that said Court of Appeals of Kentucky is the highest court in said State in which a decision in said suit could be had; and your petitioner further
490 shows that in said order and judgment affirming said judgment of the Henderson Circuit Court, and in overruling your petitioner's petition for rehearing therein, and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, said petition prays that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of, and that a Transcript of the Record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

By JOHN C. WORSHAM.

N. POWELL TAYLOR AND BENJAMIN D.
WARFIELD, *Its Attorneys.*

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed, this 13th day of June, A. D. 1916, the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Thirty-Five Thousand Dollars (\$35,000.00).

Done at Frankfort, Kentucky, this 13th day of June, A. D.

W. E. SETTLE,

Acting Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 13th day of June, A. D. 1916.

RODMAN W. KEENON,

Clerk of the Court of Appeals of Kentucky.

491 Said Writ of Error is endorsed as follows: Filed June 3rd, 1916. R. W. Keenon, C. C. A.

491½ And then again on the same date, to-wit June 13th, 1916, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, by the appellant, Louisville & Nashville Railroad Co. now plaintiff in error, Assignment of Errors, which is in words and figures as follows:

492 In the Supreme Court of the United States.

In Error to the Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
versus
JOHN G. HOLLOWAY'S ADMINISTRATOR, Defendant in Error.

Assignment of Errors.

Now comes the Plaintiff in Error, Louisville & Nashville Railroad Company, by N. Powell Taylor, John C. Worsham and Benjamin D. Warfield, its Attorneys, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the Commonwealth of Kentucky in the above entitled cause, there is manifest error to the prejudice of this Plaintiff in Error, in this, to-wit:

First. The Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Henderson Circuit Court of Kentucky, for the sum of Twenty-five Thousand (\$25,000.00)

493 Dollars, together with costs, interest and ten per cent (10%) damages, entered on error in favor of said Defendant in Error and against said Plaintiff in Error; and erred in holding that there was no error committed by said Henderson Circuit Court to the substantial prejudice of Plaintiff in Error's rights, in giving to the jury that part of instruction No. 2, which reads as follows:

"* * * then in that event you should find for the plaintiff, the measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of the pecuniary benefits she might reasonably have received if the deceased had not been killed not exceeding the amount claimed, to-wit: \$50,000.00. * * *

The said Court of Appeals of Kentucky further erred in approving the action of the Henderson Circuit Court in failing and refusing to give to the jury instruction (a) reading as follows:

494 "(a) The court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

Said instruction No. 2 is erroneous in that it permitted the jury to return a verdict which was grossly excessive, in that the verdict so returned, if placed at interest, would yield an annual income greater

than the amount the widow would have received if decedent had lived, and would leave the corpus intact in perpetuity. In other words, instruction No. 2 treated the whole loss as sustained at the time of decedent's death, and as proper to be included in the verdict without rebate or discount; whereas, the jury should have been limited in finding damages to a sum the present cash value of which would represent the widow's reasonable expectation of pecuniary advantage during her widowhood and while dependent.

495 If the Henderson Circuit Court had given said instruction (a) offered by defendant, and refused, the jury would have been limited in those respects in which, as above stated, instruction No. 2 failed to limit the jury, and in which respects the jury should have been limited.

The Court of Appeals of Kentucky (168 Kentucky Reports, Page 270) erred in holding that the "measure of damages is the amount which the deceased would probably have earned during his life for their benefit", and that "to this may be added, according to some cases, the amount which he would probably have accumulated, and which they might reasonably have expected to inherit:" and in ruling that the jury might consider and had a right to consider, in arriving at the amount to be awarded, "the amount in excess of living expenses received by the widow out of her husband's wages when he was getting a hundred and fifty and two hundred dollars a month, the pecuniary loss she sustained should not be limited to the amount required for her support and maintenance, because he gave her all of his wages, and the savings were put in the bank to their joint credit;" and the said Court also erred in holding that "it may 496 fairly be said that at the time of his death she was receiving as pecuniary benefits from him not only her support and maintenance of fifty dollars a month, but in addition thereto one-half of the savings; or, in other words, one hundred dollars a month:" which said rulings of the trial court in giving and rejecting the instructions hereinbefore set forth as approved by the said Court of Appeals of Kentucky resulted in erroneously directing the jury to disregard present values in arriving at the amount of their verdict; and to add elements of problematical gifts of savings; and to duplicate the recovery by considering the elements which would have been represented in the way of inheritance.

Second. The said Court of Appeals of Kentucky erred in holding that Holloway was "free from contributory negligence," the record showing as a matter of law that Holloway was negligent; and erred in affirming the judgment of the Henderson Circuit Court of Kentucky which had refused to set aside the verdict, though the verdict involved a finding that Holloway was free from negligence; and erred in affirming the refusal of the said Henderson Circuit Court to 497 set aside the verdict as contrary to the instruction directing the jury to diminish the verdict for contributory negligence; and erred in not holding that the said Circuit Court erred in not setting aside the verdict and entering judgment thereon though the verdict disregarded the undisputed evidence which shows that Holloway was negligent and that the jury had disregarded the court's in-

structions on contributory negligence, said undisputed evidence being that Holloway's train left Fort Deposit at 2.02 p. m., and that the collision occurred at 2.07 p. m.; that the distance between Fort Deposit and the place of accident was a little less than four (4) miles, and that the train ran that distance in five (5) minutes, or at the rate of forty-eight (48) miles an hour; whereas, the speed at which the train was authorized to run between those two points by the time table, which is in evidence, was not exceeding twenty-one (21) miles an hour. In other words, the evidence shows that Holloway ran his train between Fort Deposit and the place of accident at more than twice the schedule speed, and in finding otherwise and in failing and refusing to diminish the damages to any extent whatever on account of Holloway's contributory negligence, the jury plainly disregarded instruction No. 6, which the court gave to the jury, and

which instruction reads as follows:

498 "6. The court further instructs you that if you shall believe from the evidence that at the time the decedent, John G. Holloway, lost his life, he was operating his engine at a rate of speed in excess of the schedule rate of speed permissible for similar engines engaged at similar services at the point where the injury occurred, if he was doing so, and if in doing so he helped to cause or bring about the accident, then in that event you will find that he was guilty of contributory negligence, in which event you will diminish the damages, if any are awarded to plaintiff, in proportion to the amount of negligence attributable to the said John G. Holloway, so that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable both to the said Holloway and to the defendant."

Third. The said Court of Appeals of Kentucky erred in refusing to reverse the judgment of the Henderson Circuit Court on the ground that the damages are excessive; and erred in holding that as a part of the loss of pecuniary benefits which Holloway's
499 widow "might reasonably have received if the deceased had not been killed," the jury was entitled to take into consideration, and to award her damages for "not only her support and maintenance of \$50.00 a month, but in addition thereto, one-half of the savings," which decedent might have accumulated if he had lived out his allotted span according to the mortality tables, and she had survived him, because said Federal Employers' Liability Act, as construed by the opinions of the Supreme Court of the United States, limits such recovery to the "pecuniary assistance or support of which they (the beneficiaries) have been deprived," and the mere speculative possibility of sharing in a prospective estate is not a loss of pecuniary assistance or support within the meaning of the Act, and the recovery therefor should be excluded for that reason, as well as for the reason that it is altogether problematical whether or not decedent would have accumulated an estate if he had lived, or what the amount of it would have been, or whether the widow would have continued to be decedent's wife and would have survived him, so that she would

500 have shared in the estate, if any, which he would have left if he had lived out his allotted span, and all of which is too speculative and remote on which to predicate or sustain an award of damages of that character, in addition to awarding pecuniary damages for the widow's support equal to the pecuniary benefits she received from decedent in his lifetime for her support and maintenance.

For the foregoing prejudicial errors, and each of them, affecting the merits of this cause, the Plaintiff in Error prays a reversal of the judgment of the said Henderson Circuit Court of Kentucky, and of the judgment of affirmance thereof by the said Court of Appeals of Kentucky.

And the said Louisville & Nashville Railroad Company, as Plaintiff in Error, prays that the judgment aforesaid, for each of the errors aforesaid, whereby Plaintiff in Error has been deprived of its rights, privileges and immunities, be reversed, annulled, and held for naught.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

By N. POWELL TAYLOR,
JOHN C. WORSHAM,
BENJAMIN D. WARFIELD,

Its Attorneys.

501 Approved: This June 13, 1916.

W. E. SETTLE,

Acting Chief Justice Court of Appeals of Kentucky.

Attest:

— — —.

Said Assignment of Errors endorsed as follows: "Filed June 12, 1916. Rodman W. Keenon, C. C. A."

501½ And then again on the same date, to-wit June 13, 1916, the appellant, now plaintiff in error filed in the office of the Clerk of the Court of Appeals of Kentucky, supersedeas bond which is in words and figures as follows:

502 Court of Appeals of the State of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus

E. S. HOLLOWAY, as Administrator of the Estate of John G.
Holloway, Deceased, Appellee.

Supersedeas Bond.

Know all men by these presents, That the Louisville and Nashville Railroad Company, as principal, and the Royal Indemnity Company, as surety, are held and firmly bound unto E. S. Holloway,

as administrator of the estate of John G. Holloway, deceased, in the sum of Thirty-five Thousand dollars (\$35,000.00), to be paid to the said obligee, and to his successors in office, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

503 In testimony whereof we have hereunto subscribed our names and affixed our seals this Twelfth day of June A. D. 1916.

Whereas the above-named Louisville and Nashville Railroad Company hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Court of Appeals of the State of Kentucky: Now, therefore, The condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

By W. L. MAPOTHER, *Its First Vice-President*.

Attest:

J. H. ELLIS, *Secretary*.

ROYAL INDEMNITY COMPANY,
By HENRY G. BEDINGER,

Its Attorney in Fact.

Said Supersedeas Bond is endorsed as follows: Filed June 12th, 1916. R. W. Keenon, C. C. A.

504 STATE OF KENTUCKY,
County of Jefferson, set:

I, G. W. B. Olmstead, a Notary Public within and for the above-named County and State, certify that on this day and in said County and State the foregoing instrument was produced to me, and was acknowledged by W. L. Mapother, First Vice-President of the above named Louisville & Nashville Railroad Company to be its act and deed, and was also acknowledged by Henry G. Bedinger, attorney in fact of the above-named Royal Indemnity Company, for and on behalf of said Indemnity Company to be its act and deed.

Given under my hand and official seal this Twelfth day of June A. D. 1916.

My commission expires January 23, 1918.

G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

I hereby approve the foregoing bond and surety, this thirteenth day of June A. D., 1916.

W. E. SETTLE,
*Acting Chief Justice of the Court
of Appeals of Kentucky.*

504½ And then on the same date, to-wit June 13th, 1916, the appellant, now plaintiff in error, filed with the Clerk of the Court of Appeals of Kentucky writ of error, which is in words and figures as follows:

505 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between the Louisville and Nashville Railroad Company, appellant and E. S. Holloway, as administrator of the estate of John G. Holloway, deceased, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege,

506 or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission: a manifest error hath happened to the great damage of the said Louisville and Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky at Frankfort,

507

Kentucky, on the 13th day of June, in the year of our Lord one thousand nine hundred and sixteen.

JOHN W. MENZIES,
Clerk of the District Court of the United States
in and for the Eastern District of Kentucky,
 By CHAS. N. WIARD,
Deputy Clerk.

Allowed by
 W. E. SETTLE,
Acting Chief Justice of the Court
of Appeals of Kentucky.

Said Order allowing Writ is endorsed as follows: Filed June third, 1916. R. W. Keenon, C. C. A.

507½ And then on the 14th day of June, 1916, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, Citation, which is in words and figures as follows:

508 UNITED STATES OF AMERICA, ss:

In the Court of Appeals of the Commonwealth of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
 versus

E. S. HOLLOWAY, as Administrator of the Estate of John G. Holloway, Deceased, Defendant in Error.

You, E. S. Holloway, as administrator aforesaid, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error issued out of this court and filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein said Louisville and Nashville Railroad Company is plaintiff in error, and the said E. S. Holloway, as administrator of the estate of John G. Holloway, deceased, is defendant in error, to show cause, if any there be, why the judgment rendered against the said Louisville and Nashville Railroad Company, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

509 Witness the Honorable Warner E. Settle, Acting Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this Thirteenth day of June, in the year of our Lord one thousand nine hundred and sixteen.

W. E. SETTLE,
Acting Chief Justice of the
Court of Appeals of Kentucky.

Attest:

RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Copy of the above citation received and service accepted this 14th day of June, 1916.

CLAY & CLAY,
Counsel for Defendant in Error.

Said Citation is endorsed as follows: Filed June 15th 1916. R. W. Keenon, C. C. A.

509½ Then on the 13th day of June, 1916, the appellant, Louisville & Nashville Railroad Co. now plaintiff in error filed in the office of the Clerk of the Court of Appeals of Kentucky its praecipe, which is in words and figures as follows:

510 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus

E. S. HOLLOWAY, Administrator of the Estate of John G. Holloway,
Deceased, Appellee.

Praecipe of said Appellant, now Plaintiff in Error.

In conformity with rule 8 of the Supreme Court of the United States, and in order to the preparation of the transcript of record upon the writ of error from said Supreme Court to the Court of Appeals of Kentucky, the above named, The Louisville and Nashville Railroad Company, Appellant in said Court of Appeals, and Plaintiff in error in the Supreme Court of the United States, indicates the following as the portions of the record in this action to be incorporated into the transcript of record on said writ of error, to-wit:

1. The entire record on the second appeal, which includes all of the record in this cause, the entire record having been copied for said second appeal; and which also includes all of the evidence given, or heard by the jury, on the second trial of this case, from the
511 affirmance of the judgment on which by the Court of Appeals of Kentucky the writ of error from the Supreme Court of the United States is prosecuted.

2. The judgment of affirmance; and the opinion of the Court of Appeals of Kentucky, February 3, 1916, 168 Kentucky Reports 262.

3. Appellant's Petition for Rehearing.

4. Appellee's Response to said Petition.

5. Appellant's reply to said Response.

6. Order of Court overruling Appellant's Petition for Rehearing.

7. Appellant's motion for Time in which to Perfect Its Writ or Error.

8. Order of Court granting said Motion.

9. The Petition for Writ of Error: the Writ of Error and Allowance of Same; The Assignment of Errors; the Writ of Error Bond;

the citation, and Writ of Service of same; and this Præcipe, and Writ of Service of same.

N. POWELL TAYLOR,
JOHN C. WORSHAM,
BENJAMIN D. WARFIELD,

*Counsel for the Above Named Appellant
and Plaintiff in Error.*

Service of the foregoing præcipe accepted by Clay & Clay, Attorneys of Record of and for Appellee, E. S. Holloway, as Administrator of the Estate of John G. Holloway, deceased, this
512 twelfth day of June 1916

CLAY & CLAY,
*Attorneys for the Above Named
Appellee and Defendant in Error.*

Said Præcipe endorsed as follows: "Filed June 13, 1916. Rodman W. Keenon, C. C. A.

513 COMMONWEALTH OF KENTUCKY,
Court of Appeals:

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky certify that the foregoing is a true and complete record as called for in the præcipe filed in the case of Louisville & Nashville Railroad Company, Appellant, now plaintiff in error, vs. E. S. Holloway, Administrator of the estate of John B. Holloway, deceased, Appellee, now defendant in error, for use of the Louisville & Nashville Railroad Company, Appellant, now plaintiff in error, upon an appeal from the judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States, all of which is shown by records and on file in my office.

In testimony whereof, witness my hand and seal of office. Done at Frankfort, Kentucky this June 27th, 1916.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

(Here follows map marked p. 514.)

MAPS

TOO

LARGE

FOR

FILMING



515

Court of Appeals of Kentucky.

I, Rodman W. Keenon, Clerk of the Court of Appeals of the Commonwealth of Kentucky certify that the exhibits hereto attached, marked "time table" and "map" are the original exhibits filed in the office of the Clerk of the Court of Appeals for use on appeal in the case of Louisville & Nashville Ry. Co., appellant against John G. Holloway's Admr., appellee, and said original exhibits are now certified to the Supreme Court of the United States for use on the appeal of the case of Louisville & Nashville Ry. Co., appellant now Plaintiff in error against John G. Holloway's Admr., appellee now defendant in error.

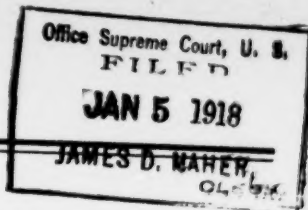
In testimony where- witness my hand and seal of office, this the 30th day of June, 1916.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Kentucky Court of Appeals.

Endorsed on cover: File No. 25,378. Kentucky Court of Appeals. Term No. 548. Louisville & Nashville Railroad Company, plaintiff in error, vs. E. S. Holloway, as administrator of the estate of John G. Holloway, deceased. Filed July 6th, 1916. File No. 25,378.





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 209.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - - Plaintiff in Error,

versus

E. S. HOLLOWAY, AS ADMINISTRATOR
OF THE ESTATE OF JOHN G. HOLLO-
WAY, DECEASED, - - - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

N. POWELL TAYLOR,
JOHN C. WORSHAM,
Of Counsel.



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The questions for decision are as to the proper measure of damage instruction to be given the jury in an action brought under the Federal Employers' Liability Act, and as to the elements proper to be considered by the jury in assessing the damages to which the beneficiary is entitled.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 209.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - - - *Plaintiff in Error,*

versus

E. S. HOLLOWAY, AS ADMINISTRATOR OF
THE ESTATE OF JOHN G. HOLLO-
WAY, DECEASED, - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE
STATE OF KENTUCKY.

For brevity, in this brief we will refer to the plaintiff in error as defendant; to the defendant in error as plaintiff, and to plaintiff's intestate, John G. Holloway, as decedent. The italics are ours.

STATEMENT.

On May 14, 1912, decedent, while in the employ of defendant as a locomotive engineer of a northbound freight train engaged in interstate commerce, was killed in a collision between that train and a work train of defendant near Calhoun, Ala. In an action brought by plaintiff, in the Circuit Court of Henderson County, Ky., to recover damages, under the Federal Employers' Liability Act, for the death, two trials were had before the court and juries, resulting in verdicts and judgments for plaintiff on both trials, to-wit: For \$32,900 on the first trial, the judgment upon which was reversed by the Court of Appeals of Kentucky (163 Ky. 125): First, because it was not alleged or proved that the widow of decedent, who left no children surviving him, had during his lifetime received any pecuniary benefits from him, or that she had expectation of receiving any from him in the future, if he had not lost his life. And, second, for errors in the instructions. On the remanding of the case to the trial court, plaintiff amended his petition in order to cure the error first above indicated (R., 130). On the second trial there was a verdict and judgment for plaintiff for \$25,000, which was affirmed by the Court of Appeals of Kentucky (R., 167, 168 Ky. 262)*, and it is to said judgment of affirmance that this writ of error is prosecuted.

*The record references are to pages of the printed record.

ASSIGNMENT OF ERRORS.

Defendant assigned three grounds of error in the decision and final judgment of the Court of Appeals of Kentucky (R., 220-223, inclusive). The first and third of these assignments relate to damages; the second, to contributory negligence. While the uncontradicted evidence on the latter point is, that the train left Fort Deposit at 2:02 P. M., and that the collision occurred at 2:07 P. M., and that the distance between Fort Deposit and the place of accident was a little less than four miles, and that, therefore, the train ran that distance in five minutes, or at the rate of 48 miles an hour, which is at least 13 miles an hour faster than authorized by defendant's rules; inasmuch as some of the witnesses expressed the opinion that the speed of the train was not in excess of the maximum speed of 35 miles an hour, at which trains of that class were authorized to run on that division, we have concluded that whether or not decedent was contributorily negligent, and the damages should have been diminished by the jury for that reason, but were not, was a question of fact for the jury, and not a question of law for the court. Therefore, we will not press our second assignment of error here; and do not copy that assignment in our brief, but only the first and third assignments of error, as follows, to-wit:

"First: The Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Henderson Circuit Court of Kentucky, for the sum of twenty-five thousand dollars (\$25,000.00), together with costs, interest and ten per cent (10%) damages, entered on error in favor of said defendant in error and against said plaintiff in error; and erred in holding that there was no error committed by said Henderson Circuit Court to the substantial prejudice of plaintiff in error's rights, in giving to the jury that part of instruction No. 2 which reads as follows:

"* * * then in that event you should find for the plaintiff, the measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed, to-wit, \$50,000.00. * * *

"The said Court of Appeals of Kentucky further erred in approving the action of the Henderson Circuit Court in failing and refusing to give to the jury instruction (a) reading as follows:

"(a) The court instructs the jury that if they shall find for the plaintiff, their verdict can not, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years.'

"Said instruction No. 2 is erroneous in that it permitted the jury to return a verdict which was grossly excessive, in that the verdict so returned, if

placed at interest, would yield an annual income greater than the amount the widow would have received if decedent had lived, and would leave the *corpus* intact in perpetuity. In other words, instruction No. 2 treated the whole loss as sustained at the time of decedent's death, and as proper to be included in the verdict without rebate or discount; whereas, the jury should have been limited in finding damages to a sum the present cash value of which would represent the widow's reasonable expectation of pecuniary advantage during her widowhood and while dependent.

"If the Henderson Circuit Court had given said instruction (a) offered by defendant, and refused, the jury would have been limited in those respects in which, as above stated, instruction No. 2 failed to limit the jury, and in which respects the jury should have been limited.

"The Court of Appeals of Kentucky (168 Kentucky Reports, page 270) erred in holding that the 'measure of damages is the amount which the deceased would probably have earned during his life for their benefit,' and that 'to this may be added, according to some cases, the amount which he would probably have accumulated, and which they might reasonably have expected to inherit': and in ruling that the jury might consider and had a right to consider, in arriving at the amount to be awarded, 'the amount in excess of living expenses received by the widow out of her husband's wages when he was getting a hundred and fifty and two hundred dollars a month, the pecuniary loss she sustained should not be limited to the amount required for her support and maintenance, because he gave her all of his wages, and the savings were put in bank to their joint credit': and the said court also erred in holding that 'it may fairly be said that at the time of his death she was receiving as pecuniary benefits from him not only her support and maintenance of fifty

dollars a month, but in addition thereto one-half of the savings; or, in other words, one hundred dollars a month': which said rulings of the trial court in giving and rejecting the instructions hereinbefore set forth as approved by the said Court of Appeals of Kentucky resulted in erroneously directing the jury to disregard present values in arriving at the amount of their verdict: and to add elements of problematical gifts of savings; and to duplicate the recovery by considering elements which would have been represented in the way of inheritance.

* * * * *

"Third:— The said Court of Appeals of Kentucky erred in refusing to reverse the judgment of the Henderson Circuit Court on the ground that the damages are excessive; and erred in holding that as a part of the loss of pecuniary benefits which Holloway's widow 'might reasonably have received if the deceased had not been killed,' the jury was entitled to take into consideration, and to award her damages for 'not only her support and maintenance of \$50 a month, but in addition thereto, one-half of the savings,' which decedent *might* have accumulated if he had lived out his allotted span according to the mortality tables, and she had survived him, because said Federal Employers' Liability Act, as construed by the opinions of the Supreme Court of the United States, limits such recovery to the 'pecuniary assistance or support of which they (the beneficiaries) have been deprived,' and the mere speculative possibility of sharing in a prospective estate is not a loss of pecuniary assistance or support within the meaning of the Act, and recovery therefor should be excluded for that reason, as well as for the reason that it is altogether problematical whether or not decedent would have accumulated an estate if he had lived, or what the amount of it would have been, or whether the widow would have continued to be decedent's wife and would have survived him, so that

she would have shared in the estate, if any, which he would have left if he had lived out his allotted span, and all of which is too speculative and remote on which to predicate or sustain an award of damages of that character, in addition to awarding pecuniary damages for the widow's support equal to the pecuniary benefits she received from decedent in his lifetime for her support and maintenance."

ARGUMENT.

I.

We will argue the first and third assignment of errors together.

The first, challenges the correctness of the judgment of the Court of Appeals of Kentucky which affirmed the judgment for \$25,000, together with costs, interest, and 10% damages, entered on error in favor of plaintiff against defendant, and which judgment approved the action of the trial court in instructing the jury (part of instruction No. 2):

"* * * then in that event you should find for the plaintiff, the measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of the pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed, to-wit, \$50,000.00, * * *"
(Record, top of page 139, and page 220),

and further challenges the judgment of the Court of Appeals of Kentucky in approving the action of the

Henderson Circuit Court in failing and refusing to give to the jury instruction (a), offered by defendant, reading as follows:

“(a) The court instructs the jury that if they shall find for the plaintiff, their verdict can not, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years” (Record, page 137, 220).

Defendant's objection and exception to the giving of instruction No. 2 and defendant's exception to the refusal of the court to give instruction (a) sharply raise the question which was decided by this court in favor of our contention in *C. & O. R'y Co. v. Kelly's Admx.*, 241 U. S. 485, and *C. & O. R'y Co. v. Gainey, Admr.*, 241 U. S. 494. The court will observe that the Court of Appeals of Kentucky, in sustaining the judgment in the case at bar, did so upon authority of the judgments of that court in those cases (Record, 173), which judgments were subsequently reversed by this court on writs of error in the opinions, *supra*, where the court held that “the question of the proper measure of damages is inseparably connected with the right of action, and in

cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts"; that where "a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded"; and that "in computing the damages recoverable for deprivation of future benefits, the principle of limiting recovery to compensation requires that adequate allowance be made, according to the circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only." It clearly follows that the Kentucky courts, in refusing to limit the recovery to present worth, as thus indicated by this Court in the opinion from which we have just quoted, committed such error as to require a reversal of the judgment in this case.

The latter part of our first, and our third, assignment of errors challenge the correctness of the verdict and judgment on still another ground: That is, that the jury not only allowed damages for the whole loss of benefits sustained by the widow, without rebate or discount to reduce the sum to present worth, but also allowed damages for her assumed loss of prospective inheritance from her husband of the estate he might have accumulated from his earnings,

if he had lived out his allotted span, and if she had survived him. That this is what the jury did, is recognized by the Court of Appeals in that part of its opinion quoted and referred to in the last division of our first, and in our third, assignment of errors. (See, also, Record, 170, 171.) That it was upon the untenable theory that the widow was entitled to recover for both of these elements is shown by her second amended petition (Record, 129) where it is alleged that she "had a pecuniary interest *in his life and in his estate*" whereby she was damaged, etc. And the Court of Appeals, erroneously as we insist, held that it was proper for the jury to award damages on this ground as well as upon the ground of loss of support sustained by the widow by reason of her husband's death. In other words, it will be observed that the Court of Appeals held that the widow was not only entitled to be compensated for her loss of support, which the evidence shows did not in any event exceed \$50 a month (Record, 151), and probably did not amount to that much, but was also entitled to recover one-half of decedent's prospective savings during his expectancy. This was as uncertain as capitalizing a contingent remainder. The court held that inasmuch as there was evidence to show that at the time of his death decedent was earning at the rate of approximately \$200 a month (the actual figures were at the rate of \$156 a month for the twelve months immediately preceding his death, Record, 84), and as the living expenses of the hus-

band and wife only amounted to about \$100 a month, there was a prospect that decedent would have saved at the rate of \$100 a month during his expectancy; and that the widow would have been entitled to half of these savings, in addition to \$50 a month for her maintenance, or \$100 a month in all. Whereas, we contend that the widow's pecuniary loss by the death was not more than \$50 a month, if that much.

This exact question has not been directly passed upon by this Court, but it seems to us the necessary meaning and effect of its decisions is, that the beneficiaries are limited to recovering only such damages as are immediately sustained by them in the death of the employe. The court has held, "The beneficiaries can recover their pecuniary loss and nothing more" (*N. & W. R'y Co. v. Holbrook*, 235 U. S. 625). In *M. C. R. Co. v. Vreeland*, 227 U. S. 59, it was held that the widow was limited to recovering proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. And it was further held that the cause of action given by the statute, is independent of any

"cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."

If then, the liability "is one beyond that which the decedent had—one proceeding upon altogether different principles," the speculative prospect of inheriting, as heir, all or part of decedent's estate upon his death from natural causes at the end of his expectancy, can not be recoverable in an action under the Act, for such estate was one which the decedent would have had and possessed. The Federal Act does not create actions in favor of the estate of the deceased. On the contrary, the death and survival actions are not subject to debts of the decedent, and are expressly for the benefit of named beneficiaries.

In *American R. Co. v. Didricksen*, 227 U. S. 145, it was held, "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained." In *G. C. & S. F. R'y Co. v. McGinnis*, 228 U. S. 173, the court held that "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained." To the same effect are *North Carolina R. Co. v. Zachary*, 232 U. S. 248, and *Garrett, Admr., v. L. & N. R. Co.*, 235 U. S. 308.

In *Kansas City Southern R'y Co. v. Leslie*, 238 U. S. 599, the trial court charged the jury to find the

pecuniary loss by taking "into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time, and the deceased's earning power and rate of wages," and then added:

"From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff."

The instruction was held erroneous, in that it conflicted with the approved rule that "a recovery therefor by the administrator is a trust for designated individuals, and must be based upon their actual pecuniary loss" (citing cases).

We respectfully submit that all of the verdict which was predicated upon hypothetical prospective savings and accumulations of decedent was erroneous; finds no support in the Federal Employers' Liability Act and the opinions of this Court construing it; and that the verdict is excessive by at least the amount of the hypothetical savings and accumulations embraced in it.

We have thus far argued this question as one of first impression. But we think the proposition is abundantly sustained by adjudged cases. In the Vreeland case, *supra*, in which the court first considered the question as to what damages might be recovered

under the Act, its similarity to Lord Campbell's Act, which had theretofore been adopted in most of the American States, was pointed out, and the purpose of the Federal Act was thus stated:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds—'or in case of the death of such employe, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death,' etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only.

"The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act. This Act has been, in its distinguishing features, re-enacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured

person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death."

It had long and uniformly been held by State courts in construing their statutes re-enacting Lord Campbell's Act, where those statutes designated the persons for whose benefit recovery could be had, that it was a trust fund in the hands of the personal representative for the benefit of the persons designated by the statute; did not constitute a part of the decedent's estate; and was not liable for his debts. In *Gottlieb v. North Jersey Street R'y Co.*, 63 Atlantic, 339, 72 N. J. L. 480, citing *Dennick v. R. Co.*, 103 U. S. 11, the rule was declared as we have just stated it. And, *In re Williams' Estate*, etc., 107 N. W. 608, 130 Iowa, 553, in discussing the death statute of Michigan, the court held that the statute indicated a legislative intent "to provide a recovery, not for the damages to the estate of the decedent, but such damages as his death has occasioned to his family or next of kin. If such be the true meaning of the Act, and the obligation or liability of the railway company under such circumstances is not to the estate of the deceased, but to the persons standing in the specified relation to the said deceased, it follows of necessity that the creditors of his estate have no claim upon the moneys so collected, and are not entitled to subject them to the payment of decedent's debts."

In *Western Railway of Alabama v. Russell*, 39 Southern, 311, 144 Alabama, 142, where the cause of action arose in the same State where this one arose, the Supreme Court of Alabama held that under Section 27 of the Code of that State, which provided that in actions for death by wrongful act the damages recoverable are not subject to the payment of the liabilities of the decedent, that a railway company, when sued for the negligent death of an engineer occasioned by a defect in the roadbed, can not set off damages to its cars by reason of decedent's negligence. See also *Griswold v. Griswold*, 111 Alabama, 572; *Commonwealth v. Metropolitan R'y Co.*, 107 Mass. 226; *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176, 180; *P., C., C. & St. L. R'y Co. v. Moore*, 152 Indiana, 345; *L. E. & St. L. R. Co. v. Clark*, 152 U. S. 230. And in *Doherty on Liability of Railroads to Interstate Employes*, page 270, it is said:

"It must be borne in mind that this Act does not relate to the distribution of the personal property of an estate. The cause of action does not belong to the estate of the deceased person, but to certain classes for whose benefit the administrator is authorized to recover damages, etc."

Many other authorities might be cited if it were necessary. The effect of all these decisions, we submit, is that recoveries in actions of this character are for the exclusive benefit of the persons named in the statute, and such recoveries never constitute a

part of the estate of the deceased person. Applying this rule to the question we are now considering, it is at once apparent that what decedent would have saved out of his earnings, if anything, if he had lived out his expectancy, would have belonged to his estate, and would be a very different thing from the contributions he would have made to his wife from time to time for her support and maintenance. And such savings, being a part of his estate, would be something wholly different from that which may be recovered under the Act, and which, as we have seen, can never become a part of the estate of the deceased person.

Opposing counsel may attempt the answer, that instruction No. 2, which the court gave the jury, told them that the measure of recovery was "such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed," and that, therefore, the jury were not authorized to, and did not, find any damages predicated upon the share the widow might have had in decedent's estate, if he had lived out his allotted span and she had survived him. But if such an argument shall be made, it is sufficient to say that plaintiff sought in her second amended petition (R., 129) to recover for the widow's pecuniary interest in decedent's *estate* as well as in his *life*; and the opinion of the Court of Appeals of Kentucky concedes that

the verdict of the jury embraced her prospective inheritance if her husband had lived out his life expectancy, when it says (Record, 172, 173):

"But counsel for the railroad company argue that under no state of case should the recovery have exceeded \$17,166.00. They get this amount by multiplying the life expectancy of the deceased by fifty dollars a month, or six hundred dollars a year, that being the annual sum it is claimed the husband was contributing for the support of his wife at the time of his death.

"We do not of course know by what method of calculation the jury arrived at the amount awarded, but if in reaching a conclusion they considered, as they had a right to do, the amount in excess of living expenses received by the widow out of her husband's wages when he was getting a hundred and fifty and two hundred dollars a month, the pecuniary loss she sustained should not be limited to the amount required for her support and maintenance because he gave her all of his wages, and the savings were put in bank to their joint credit. So that it may fairly be said that at the time of his death she was receiving as pecuniary benefits from him not only her support and maintenance of fifty dollars a month but in addition thereto one-half of the savings; or, in other words, one hundred dollars a month. Under these conditions the jury might well have considered that the pecuniary loss sustained by the widow was one hundred dollars a month, or twelve hundred dollars a year, which would make a total sum much larger than the award.

"The Federal statute does not fix any rule by which to measure the damages in cases like this, nor is there any statute in this State on the subject. So that the amount to be awarded is not controlled by any statute law. It is left to the jury to say what the finding shall be; and under the settled practice

of this court their finding will not be interfered with unless it strikes the mind at first blush as being grossly excessive; or, in other words, is so excessive as to appear to have been given under the influence of passion or prejudice.

"In the consideration of this matter it will at once be perceived that it is exceedingly difficult for a court or a judge to say when a verdict in cases like this is excessive or when it is so largely more than in reason should be awarded as to justify the court in setting aside the finding of an impartial jury who are equally if not better qualified to determine questions like this than would be a judge or the court. It does not appear and is not urged that in hearing and disposing of this case the jury were influenced by either passion or prejudice. The complaint is rested solely on the ground that the assessment of damages is excessive. But if we should say that it was excessive, and that for this reason the judgment should be set aside, upon what ground should we rest our decision? Upon what ground could we with propriety interfere with the finding of that tribunal to whom the Constitution and laws of this State have committed the settlement of disputed questions of fact like this? It is, as we have stated, a case presenting exceptional facts upon which a large verdict might well be sustained, and we do not feel authorized on these facts to set up our judgment against that of the jury. *C. & O. R'y Co. v. Kelly*, 160 Ky. 296; *C. & O. R'y Co. v. Dwyer*, 162 Ky. 427."

Of course, in making our argument in the Court of Appeals, referred to in the first paragraph of the foregoing quotation from the opinion, that in no state of case should the recovery exceed \$17,166, we made it upon the case as presented by the Record, whereby the trial court gave instruction No. 2 and

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refused to give instruction (a) offered by defendant, and we were endeavoring to show that even as thus erroneously instructed, the jury were not justified in finding a verdict in excess of \$17,166, although they were not required to reduce the award to present worth as defendant asked in offered instruction (a) which was refused. In view of the recent opinions of this court in the Kelly and Gainey cases, *supra*, it necessarily follows that a judgment for even as much as \$17,166 would have been excessive (and how much more so is the actual judgment for \$25,000?), because that judgment treated the whole loss as sustained at the time of decedent's death and as proper to be included in the verdict without rebate or discount; whereas, the jury should have been limited in finding damages to a sum the present cash value of which would represent the widow's reasonable expectation of pecuniary advantage during her widowhood and while dependent.

Defendant having requested that the jury be instructed to reduce the damages to present worth, it was the duty of the trial court to instruct on that point, whether it gave instruction (a) as asked by defendant, or prepared or directed the preparation of a proper instruction, if the court regarded instruction (a) as defective, either as to the rate of interest named therein, or otherwise. As this court said in *C. & O. R'y Co. v. De Atley*, 241 U. S. 310, 316:

"But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. *Louisville & Nash. R. R. Co. v. Harrod*, 115 Kentucky, 877, 882; *West Kentucky Coal Co. v. Davis*, 138 Kentucky, 667, 674; *Louisville, H. & St. L. R'y Co. v. Roberts*, 144 Kentucky, 820, 824.

"Although the present action was based upon a Federal statute, it was triable and tried in a State Court, hence local rules of practice and procedure were applicable. *Central Vermont R'y v. White*, 238 U. S. 507, 511; *Minneapolis & St. Louis R. R. Co. v. Bombolis*, this day decided, *ante*, p. 211. The Kentucky Court of Appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk, and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was, is a question of law, and of course, in this case, a Federal question; and since the Court of Appeals assumed to decide it, it is incumbent upon us to review the decision. *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 257."

A ready method of computing present worth is provided by the "Text-Book of the Accountancy of Investment," by Charles E. Sprague (1906).^{*} That work is divided into three parts. On pages 26 and 27 of Part 3, Table IV, Part 2, is shown the present worth of an annuity of \$1 at the end of each period

^{*}See, also, Ray's New Higher Arithmetic, page 314.

from one to one hundred years, at interest rates of $2\frac{3}{4}\%$, 3% , $3\frac{1}{2}\%$, 4% , $4\frac{1}{2}\%$, 5% , and 6% , respectively. At 6% (the legal rate of interest in Kentucky), the present worth of \$1 for 30 years, which the Court of Appeals took as decedent's expectancy in this case, is \$13.76483115. Multiplying this sum by 600, the annuity at \$50 a month, yields \$8,258.90. At 5% the present worth of \$1 is \$15.37245103, which, multiplied by 600, the annuity at \$50 a month, yields \$9,223.47. In other words, the sum which, at 6% , will yield \$50 a month for 30 years and exhaust the principal sum at the end of that period, is \$8,258.90; or, such sum at 5% , is \$9,223.47. On the basis of 6% the verdict for \$25,000 in this case is excessive by \$16,741.10; or, on the basis of 5% , is excessive by \$15,776.53. This calculation gives to the beneficiary all of the best of it, in that, as said by the Kentucky Court in *Stewart's Admr. v. L. & N. R. Co.*, 136 Ky. 717, 724:

“* * * The life tables are based on the ordinary expectation of life, and are used by insurance companies, but they are not based on what are known as extra-hazardous employments. The work of a brakeman on a railroad train is classed among the extra-hazardous employments, and, while the life tables are competent evidence in cases like this for want of any better evidence on the subject, the extra-hazardous character of the service should also be taken into consideration, for the deceased was earning \$960 in an extra-hazardous employment, and he might not earn so much in an employment less hazardous.”

Obviously, the vocation of locomotive engineer is quite as hazardous as that of brakeman. And it is equally true of the engineer as of the brakeman, that, in order to make the large wages the engineer receives, he must engage in an extra-hazardous employment, and might not earn so much in an employment less hazardous—one of the character on which the life tables are based.

By way of demonstrating, from another angle, that the verdict of \$25,000 was very excessive: If plaintiff were to receive that sum now, and invest it at even the low rate of 4% interest for the period of decedent's life expectancy, as adopted in the opinion of the Court of Appeals, of 30 years, it would yield \$30,000 of interest, not compounded, which, added to the principal, would make \$55,000 the widow would have received at the end of decedent's expectancy. Or, calculated at 5%, the interest for that period would amount to \$37,500, which, added to the principal, would make \$62,500 she would receive at the end of decedent's expectancy; or, calculated at the rate of 6%, it would yield interest amounting to \$45,000, which, added to the principal, would make \$70,000 she would receive. At compound interest, of course, the amount would be much larger. These figures well illustrate the injustice of permitting the jury to compute "the damages recoverable for the deprivation of future benefits" without making "adequate allowance" "for the earning power of money," in that, instead of the principal sum being

exhausted at the end of the expectancy period, such capital will not only be intact at the end of the expectancy period, but will be largely augmented by interest accumulations if the widow lives as economically during her widowhood as the evidence shows she lived during her married life.

As illustrating the results of some calculations which have been made by the courts, under present worth tables, in order to ascertain whether or not damage verdicts were excessive, and as showing that in most instances they were very excessive and were set aside for that reason, we will cite, without quoting from, some of the cases: *McCabe v. Narragansett E. L. Co.*, 26 R. I. 427, 59 Atl. 112; *Reynolds v. Narragansett E. L. Co.*, 26 R. I. 457, 59 Atl. 393; *Hackney v. Delaware & A. T. & T. Co.*, 69 N. J. Law, 335, 55 Atl. 252; *Watson v. S. A. L. R'y Co.*, 133 N. C. 188, 45 S. E. 555; *Southern R'y Co. v. Hill*, 139 Ga. 549, 77 S. E. 803; *Duke v. St. L. & S. F. R. Co.*, 172 Fed. 211; *Neil v. Idaho & W. N. R. Co.*, 125 Pacific, 331; *Bradbury v. C., R. I. & P. R'y Co.*, 128 N. W. 1; *St. L., I. M. & S. R'y Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *McCoullough v. C., R. I. & P. R'y Co.*, 142 N. W. 67; *Hirschkovitz v. Pa. R. Co.*, 138 Fed. 438; *The Central Railroad v. Rouse*, 77 Ga. 393, 408, 409; *A. & W. P. R'y Co. v. Newton*, 85 Ga. 517, 528, 529, 11 S. E. 776; *Pickett v. Wilmington & W. R. Co. (N. C.)*, 23 S. E. 264; *Richmond v. The Chicago & W. M. R'y Co.*, 87 Michigan, 374, 49 N. W. 621.

Some of the foregoing cases are cited, together with some which we have not cited, in *C. & O. R'y Co. v. Kelly*, 241 U. S. 485, 493-494, *supra*.

In *Southern R'y Co. v. Hill*, 139 Ga. 549, 77 S. E. 803, *supra*, the Supreme Court of Georgia, in a case under the Federal Employers' Liability Act, expressly disapproved an instruction which authorized the jury to award damages, reduced to present cash value, representing the contributions which decedent's next of kin might have received from him during his expectancy of life, and also their expectancy in the net earnings in excess of expenditures, which decedent might have accumulated during his expectancy, reduced to their present cash value. The Georgia Court held, as we contend here, that the latter damage, if any, was a loss to decedent's estate, and not a loss of contributions from him which his beneficiaries sustained by his death, such as might be recovered for under the Federal Act.

We think the crux of this question lies in the fact that it is not the loss to decedent's estate, but only the loss to the beneficiaries named in the statute, which may be recovered. The deprivation or loss by the beneficiaries of such money contributions as they received from decedent in his lifetime, is a loss sustained by such beneficiaries, within the meaning of the Act. But the loss to decedent's estate is not, as decedent's net earnings and savings, if any, would have constituted a part of his estate, distributable after his death from natural causes, and not a part

of his expenditures for his beneficiaries in his lifetime.

In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, this court, reiterating the rule that "The damages are to be based upon the pecuniary *loss* sustained by the beneficiary," commented on the fact that "The State law seems not to recognize this limitation upon the measure of recovery; certainly the damages in the present case were assessed without regard to it." The Century Dictionary thus defines the word "loss": "Failure to hold, keep, or preserve *what one has had in his possession*; disappearance from possession, use, or knowledge; *deprivation of that which one has had*: as, the *loss* of money by gaming; *loss* of health or reputation; *loss* of children; opposed to *gain*." So, too, in *N. & W. R'y Co. v. Holbrook*, 235 U. S. 625, 629, *supra*, it was held that "under the Employers' Liability Act, where death is instantaneous, the beneficiaries can recover their pecuniary *loss*, and nothing more." As we have shown, the pecuniary *loss* must be of that which "one has had in his possession"; the "deprivation of that which one has had."

We think it necessarily follows, that in the case at bar the jury should have been limited to finding, calculated at present worth, such a sum as would have yielded the widow during decedent's expectancy that of which his death *deprived* her—that which she had from him while he was living; which she *lost* by his death, to-wit: an income not exceed-

ing \$50 a month, and which, as we have seen, a verdict for \$8,258.90 would have yielded her, invested at 6%, or \$9,223.47 would have yielded her, invested at 5%. There can be no deprivation or loss of that which one has never had, as of a prospective inheritance, which is not *in esse*, but only *in posse*, which might not have been accumulated by decedent, if he had lived out his allotted span, and which the widow might or might not have inherited, depending on whether or not she outlived him, and on other speculative circumstances.

Merely for the sake of illustrating how excessive the verdict in this case is, and without meaning in any degree to assent to the view, opposed to that for which we are here contending, that the widow was entitled to recover not only the \$50 a month for her support, which she lost by decedent's death, but also one-half of prospective savings which he might have accumulated at the end of his expectancy, whereby the Court of Appeals of Kentucky figured "the jury might well have considered that the pecuniary loss sustained by the widow was one hundred dollars a month, or twelve hundred dollars a year, which would make a total sum much larger than the award" (Record, 172), it is easy to show that the verdict, even on this basis, is excessive. Manifestly, even if plaintiff was entitled to recover both elements of damage, they should both have been reduced to present worth. On the basis that the widow's pecuniary loss by her husband's death was \$100 a month, in-

stead of \$50 a month, at 6%, she should have recovered \$16,477.80, instead of \$25,000; or, at 5%, she should have recovered \$18,446.94. In other words, at 6%, the verdict for \$25,000 is excessive by \$8,522.20; or, at 5%, is excessive by \$6,553.06. So that, even on the basis of compensation erroneously approved by the Court of Appeals of Kentucky, the verdict is excessive, for the reason that that court treated the verdict as properly "made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded" (C. & O. R'y Co. v. Kelly, 241 U. S., on page 489, *supra*).

Upon the arguments made and authorities cited we respectfully ask that the judgment of the Court of Appeals of Kentucky which affirmed the judgment of the Henderson Circuit Court, be reversed.

Respectfully submitted,

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N. POWELL TAYLOR,
JOHN C. WORSHAM,
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Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 209.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - - - Plaintiff in Error,

versus

E. S. HOLLOWAY, as Administrator of the
Estate of John G. Holloway, Deceased,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

N. POWELL TAYLOR,
JOHN C. WORSHAM,
Of Counsel.

January 24, 1918.

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 1 Acts of Ky. Legislature, 1883-1884, page 43.



SUPREME COURT OF THE UNITED STATES

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LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - - - *Plaintiff in Error,*
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E. S. HOLLOWAY, AS ADMINISTRATOR OF
THE ESTATE OF JOHN G. HOLLOWAY,
DECEASED, - - - - - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE
STATE OF KENTUCKY.

In this reply brief, we shall continue to refer to the parties as they were styled in our original brief; and to pages of the printed record, where references are made to the record, as was done in that brief.

I.

It is fundamental, of course, that an appellate court is confined to the consideration and decision of questions presented by the record; and equally fundamental that such questions can be preserved for

review on appeal only by being made part of the record by order of court, or by a bill of exceptions which has been approved by the trial judge and made part of the record by order of court. Wherefore, this court has held that arguments of counsel in the State Court to which the writ of error of this court is directed form "no part of the record upon which action is taken here." (*Sayward v. Denny*, 158 U. S. 180, 183.) Nor did the opinions of State courts, until made so by rule of this court (*Id.*, 184; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 483; Rule 8, §2). Consequently, so much of plaintiff's brief as discusses what was contained in or omitted from defendant's brief in the Court of Appeals of Kentucky is clearly inadmissible.

However, we do not need nor desire to hide behind the rule. The judgment of the Henderson Circuit Court which was affirmed by the Court of Appeals of Kentucky and to which the writ of error of this court is directed, was rendered June 2, 1915 (R., 132); defendant's motion for new trial (R., 133) was overruled June 5, 1915 (R., 134); and time was given defendant until the 1st day of the succeeding term of such Circuit Court to file its bill of exceptions and transcript of evidence. These were duly tendered, September 6, 1915, and approved by the court September 24, 1915. The record was filed in the Court of Appeals December 1, 1915. Sometime during the same month defendant's brief in that court was filed with the record. The case was decided February 3,

1916. We call attention to these dates for a reason now to be discussed.

On February 25, 1914, more than 15 months before this case was retried in the Circuit Court, and almost 2 years before it was decided by the Court of Appeals, and a year and a day before that court decided this case on the first appeal on February 24, 1915 (163 Ky. 125), the court decided *C. & O. R'y Co. v. Dwyer's Admx.*, 157 Ky. 590, and laid down the rule as to the proper measure of damage instruction to be given in an action under the Federal Employers' Liability Act as follows:

"such a sum in damages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence showed they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant, if it was so caused." * * *

There was another trial of that case in the lower court. The jury were instructed in accordance with the direction of the Court of Appeals, and returned another verdict for the administratrix, the judgment on which was affirmed by the Court of Appeals (162 Ky. 427), but reversed by this court (241 U. S. 494) because the damage instruction did not require the jury to reduce their award to present worth.

On February 27, 1914, two days after the Kentucky Court prescribed what it regarded as the proper damage instruction, in cases under the Federal Act, in the *Dwyer (Gainey)* case, the same court,

in a response to a petition for rehearing in *L. & N. R. Co. v. Stewart's Admx.*, 157 Ky. 642, said:

"Upon a new trial the measure of damages will be given under the Federal Statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of *C. & O. R'y Co. v. Dwyer's Admx.*, 157 Ky. 590."

On October 15, 1914, more than a year before the case at bar was argued and decided in the Court of Appeals on the appeal involved in this writ of error, that court affirmed the judgment in *C. & O. R'y Co. v. Kelly's Administratrix*, 160 Ky. 296, which this court reversed in 241 U. S. 485, because the jury were not required to reduce the damages to present worth.

On October 7, 1915, before the case at bar was briefed and decided in the Court of Appeals, that court, in *Lexington Utilities Co. v. Parker's Admr.*, 166 Ky. 81, 89, approved a measure of damage instruction, on authority of several previous cases including the Kelly case, *supra*, which not only did not require the jury to reduce the damages to present worth, but refused to permit the jury to take into consideration the money decedent might reasonably have been expected to spend on himself for his proper maintenance and support if he had not been killed. The Parker case was not under the Federal Act, but is illuminating as to the construction that court put upon its opinion in the Kelly case, and as to the court's adherence to the last named opinion.

On December 14, 1915, before the case at bar was docketed in the Court of Appeals, and almost two months before it was decided, the court decided *C. & O. R'y Co. v. Kornhoff*, 167 Ky. 353, where it said:

"Objection is also urged because of the failure of the court in giving the instruction on the measure of damages limiting the amount to a lump sum which would represent the present cash value of what his entire damages might be throughout the period of his permanent injuries, growing out of the reduction of his power to earn money if the same should be paid him in monthly installments throughout that time; or, in other words, that the amount should be such a sum that if placed at interest would be wholly consumed by the time for which he was given damages should cease. In disposing of this it is sufficient to say that this question was thoroughly considered and the contention denied in the opinion of this court in the case of *C. & O. R'y Co. v. Dwyer*, 162 Ky. 427, and we do not deem it necessary to reiterate the reasoning therein made."

It will thus be seen that before the case at bar was argued and decided in the Court of Appeals, that court, *in at least five cases*, had conclusively settled, so far as it was possible for that court to settle the question, that the proper measure of damage instruction in cases under the Federal Act was as indicated in the *Dwyer* case, 157 Ky. 590, *supra*, and that it was not necessary, or even permissible, for the court to require the jury to reduce the damages to present worth. And it was for that reason alone that this question was not stressed in our argument in that court. Where a court has not only once but re-

peatedly decided a question, we conceive that counsel are precluded, not only by the doctrine *stare decisis* but because of the respect due the court from counsel, from expressly rearguing that question in that court. As was said in *Schwalk's Admr. v. City of Louisville*, 135 Ky. 570, 578:

"We will not enter upon a discussion of the authorities from the courts of other States relied on in argument by counsel in support of their respective contentions, *as we should be and are controlled in the conclusions we have reached by this court's several previous adjudications of the questions herein involved.*" (Our italics.)

The same court, in *Proctor v. L. & N. R. Co.*, 156 Ky. 465, said:

"In *Cooley's Constitutional Limitations* it is said that when a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and that if the practice were otherwise, it would be leaving us in a perplexed uncertainty as to the law, 7th Ed., page 84.

"Upon the principle of *stare decisis*, the decisions which have been rendered by a court will be adhered to by such court in subsequent cases, unless there is something manifestly erroneous therein, or the rule or principle of law established by such decisions has been changed by legislative enactment. 11 Cyc. 746.

"And, while we are not unmindful of the salutary tendency of the rule of *stare decisis*, we are at the same time not averse to re-examining a question *which has been passed upon on a single occasion only, and has not established a rule of property.*" (Last italics ours.)

These cases certainly foreclosed further elaborate argument of the measure of damage question we are now considering, in the Court of Appeals of Kentucky, after it had decided that question adversely to our contention *at least five times* before the record and our arguments in this case were before that court.

The rule in this court seems to be even more strict. In *Haynes v. Pickett*, 154 U. S. 627, the opinion reads:

“There is a Federal question in this case, but it was decided in *Ray v. Norseworthy*, 23 Wall. 128, and we are not inclined to hear it reargued. The motion to dismiss is, therefore, denied, and that to affirm granted, upon the authority of that case.”

The court ruled similarly in four other cases reported in the same volume of the Reports, page 623, *Davies v. Slidell*, etc.

II.

Therefore, even if the court will consider at all the statements in the brief on the other side, *dehors* the record, as to what was argued or not argued for defendant in the Court of Appeals, we confidently believe that this court will not hold, on that ground or otherwise, that defendant waived any of its rights to have reviewed by this court the questions of the duty of the trial court to give Instruction “a” offered by defendant, and of the error of that court in giving that part of Instruction 2 of which we are now

complaining, on its own motion. These questions were raised at the proper time and in the proper way in the trial court. The bill of exceptions, approved by the trial judge and made a part of the record by order of court (R., 135-140), recites, *inter alia*:

"At the conclusion of all the evidence, the defendant moved the court to give the jury the following instructions numbered *a, b, c, d* and *e*, which motion the court overruled, to which ruling the defendant at the time excepted and still excepts. Said instructions are in full as follows, viz:

"a. The court instructs the jury that if they shall find for the plaintiff, their verdict can not, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years" (R., 137).

Then follow the other four instructions *b, c, d* and *e*, offered by defendant, and refused by the court, which it is not necessary to copy here.

The bill of exceptions then recites (R., 138) that the court, on its own motion, gave the jury certain written instructions, seven in number, and one oral instruction, to all of which defendant objected and excepted at the time and still excepts. The only one of these instructions, given by the court, with which

we are now concerned is that part of No. 2 which attempted to tell the jury what the measure of damages was, in these words (R., 139):

“* * * the measure of recovery if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed, to-wit, \$50,000.00” * * *.

These same questions were raised and saved by defendant's motion and grounds for new trial, filed by order of court and made part of the record (R., 133). Hence, as we have said, it is beyond cavil or controversy that defendant raised and saved in the trial court the questions it asks this court to review. There is no assignment of errors in taking a case from an inferior court in Kentucky to the Court of Appeals, since the Act of the Kentucky Legislature, April 4, 1884, which repealed so much of the Code of Practice as required an assignment of errors (1 Acts Ky. Legislature, 1883-1884, page 43; *L. & N. R. Co. v. Brice*, 83 Ky. 210, 211). So that, defendant raised and saved these questions as to the instructions in the only way it could do so—by offering instruction marked “a” which was refused; by objecting to No. 2, which the court gave; by excepting to the action of the court in both particulars; by its motion for new trial; and by its bill of exceptions filed in the lower court by order of court. Wherefore, the fact that such error,

committed against defendant by the trial court, was not specially stressed in the Court of Appeals, for the reason that said court had already decided the questions against our contention at least five times before the case at bar reached that court, does not in any wise, we respectfully submit, affect our right, much less foreclose it, to have these errors reviewed by this court on writ of error.

But we do not need to press our argument thus far. It is conceded by plaintiff's counsel, on pages 27, 28 and 29 of his brief, that we did argue in the Court of Appeals that the trial court erred in giving Instruction 2 and in refusing Instructions "a" and "e", quoted those instructions in our brief, and argued that if the trial court had not improperly given No. 2, and had given, as it should have done, Instructions "a" and "e," it would not have been admissible for plaintiff to argue to the jury that they had a right to award the widow damages for prospective savings of decedent, if he had survived, as well as for loss of support and maintenance. And we further said, as the quotation in plaintiff's brief shows (p. 28):

"The argument (by plaintiff's counsel) was made only because of the error of the court in giving and refusing the measure of damage instructions. Appellant having once raised and saved the question by objecting and excepting to the instructions given, and by offering instructions that would have presented the correct measure of damages, which the court refused to give, it was not necessary to repeat

the objection wherever subsequent error on this point was made during the trial." (Citing and quoting from *C., N. O. & T. P. R'y Co. v. Bennette*, 134 Ky. 19, that "When objection is once made, and overruled, as to a line of examination, it is not necessary to repeat it whenever it recurs. It may be assumed that the court will adhere to the ruling, and, indeed, that he does so in fact as well as in effect until the ruling is withdrawn.")

We confess we are unable to comprehend why opposing counsel, after quoting from our brief in the Court of Appeals the language a small part of which we have last quoted, say: "Can the court by any possible rule of construction find in this argument the least intimation that these instructions did or did not submit to the jury the question of present cash values?" The argument referred to quoted Instruction "a" as a part of it. Does not that instruction speak for itself? Is it not a plain direction to the jury to find only present worth? Does it or can it be construed to mean anything else? If the instruction had been given the jury, and they had disregarded it in making their verdict, would not it have been the duty of the trial court to set the verdict aside as contrary to the instruction? A verdict is contrary to law when it is contrary to the instructions, whether they are right or wrong. (*Lynch v. Snead Architectural Iron Works*, 132 Ky. 241; *Insurance Co. v. Kendle*, 163 Ky. 146.) And equally unavailing, it seems to us, is plaintiff's criticism that the petition for rehearing did not expressly complain of the error of refusing

to require the jury to reduce their award to present worth. It is not essential to a review here that a petition for rehearing be filed in the lower court; or, if it is, that all the questions that will be relied on here be reargued there. The same reasons, already argued, why this question was not stressed in the argument on the original hearing below, equally forbade the question's being argued again in the petition for rehearing.

III.

As we understand plaintiff's argument, by and large, it is that because we did not, in the Court of Appeals, devote the greater part of our brief to a discussion of the errors committed by the trial court in giving the measure of damages, or the method of ascertaining the same, to the jury in Instruction 2 and in refusing to give Instruction "a" (and, also, "e," not assigned as error here), that this by some ungraspable method of transmutation, converted our objections to giving Instruction 2 and refusing Instruction "a" into merely a complaint that the damages are excessive, in and of themselves, and not because of error in their assessment, authorized and permitted because of the instruction given and the one refused on that point. It is hardly necessary to expressly challenge so obviously untenable a proposition.

In *Southern R'y Co., et al., v. Bennett, Administratrix*, 233 U. S. 80, on which opposing counsel leans so heavily in his brief (p. 10), we have examined the printed transcript of record filed in this court, which shows an entirely different condition from that which we have here. In that case, on motion of counsel for the railroad, the trial court charged the jury that the sum to be awarded by them must be computed "at its present cash value" (*Bennett Record*, page 163); "you shall allow only the present value of the pecuniary loss of the beneficiaries by reason of the death of plaintiff's intestate," the meaning of which the instruction explained to the jury (page 163). Neither in the motion for new trial in the trial court, in the assignment of errors in the State Supreme Court, nor in the assignment of errors in this court was it claimed for the railway companies that there was error either in giving or in refusing instructions on the measure of damages. And defendants were obviously precluded from making such complaint, since the instructions on that subject were offered by them and were given as asked. As the State Supreme Court said: "The judge charged the written requests of defendants, as prepared by them and asked for and adopted the exact language. They can not now be heard to complain of getting what they asked for," etc. (page 175). And, again, the opinion of this court says it was admitted in argument that the judge charged

the jury correctly. (233 U. S. on page 86.) Therefore the Bennett case, as this court said, presented merely the question as to whether the jury, properly instructed, returned an excessive verdict. Whereas here the jury were not properly instructed and returned an excessive verdict, which they might not have done if they had been told that they must reduce the damages to present worth.

The trial court was requested by defendant to give the jury an instruction limiting their award to present worth and not to give the instruction which imposed no such limitation. Both requests were refused.

Furthermore, when the Bennett case was decided, this court had not considered the question it decided in the Kelly and Gainey cases (241 U. S. 485, 494) at all as affecting cases under the Federal Employers' Liability Act. The Kelly opinion so states (p. 491). The Gainey case (241 U. S. on p. 469) seems to us conclusively to refute plaintiff's argument. The opinion says:

"Laying aside (another contention), the only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict for \$16,000. On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of \$16,000 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of

her death. The court overruled this contention, on the authority of *Ches. & Ohio R'y v. Kelly's Admx.*, 160 Ky. 296, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the Court of Appeals in the present case (162 Ky. 427) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict. Since we have held, in *Ches. & Ohio R'y v. Kelly, Admx.*, this day decided, *ante*, p. 485, that the theory is erroneous, it results that the judgment here under review must be reversed," etc.

It follows, from this language, that the fact that we argued in the Court of Appeals that the verdict was excessive must be considered in connection with the further fact that we asked that the jury be instructed as this court held in the *Gainey* case the jury should have been; that the trial court here, as there, refused so to instruct the jury; and that it was only upon the theory adopted by the trial court in the case at bar in giving and refusing instructions, and approved by the Court of Appeals, that the jury should not be required to reduce their award to present worth, that the latter court "was able to reach a conclusion sustaining the verdict," as the calculations made in our original brief in this court conclusively demonstrate. Indeed, in the case now under review, the Court of Appeals in its opinion (Rec., 172, 173) expressly referred to and adhered to what it had theretofore decided in the *C. & O.* cases (160 Ky. 296 and 162 Ky. 427), *supra*.

IV.

On page 20 of plaintiff's brief a quotation is made from the opinion of the Court of Appeals to the effect that inasmuch as no measure of damages is fixed by the Federal Act or other statute, the question is solely for the jury. Manifestly, this is not the law since this court decided the Kelly and Gainey cases. In the former opinion (241 U. S. on p. 491) it is said:

"But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts."

And the court then went on to hold that "the ascertained future benefits ought to be discounted in making up the award." In other words, the Court of Appeals was in error in making the statement, last referred to, quoted in plaintiff's brief.

Since, then, "the question of the proper measure of damages is inseparably connected with the right of action," in cases under the Federal Act, even if what we have already stated as to the reason for not pressing, further than was done, in the Court of Appeals, the error of the trial court in refusing the instruction which would have required the jury to reduce the damages awarded to present worth and insisting on the court's reiterating its previous decision of that question in five cases, should not meet

with the court's approval, nevertheless this court will review the judgment on the ground that a judgment which avoids all reference to a Federal question, *a decision of which is actually necessary to the determination of the case*, is as much against the right claimed as though it had been directly refused. As this court said in *Chapman v. Goodnow's Admr.*, 123 U. S. 540, 548:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Applying this reasoning to our case: The important Federal question, *i. e.*, as to the proper measure of damage instruction, was certainly fairly and fully presented by the record on which the case was appealed from the trial court to the Court of Appeals, as already demonstrated. And, on the authority of the *Gainey* case, as shown by the quotation above made, the decision of that question was "actually necessary to the determination of the case," otherwise the Court of Appeals could not have sustained the verdict. In other words, the necessary effect of that court's affirmance of the judgment for \$25,000 for the benefit of the widow of Holloway was to pass

on the measure of damages applicable to the case and to sustain the trial court in giving Instruction 2, and in refusing Instruction "a," and, also, to sustain plaintiff's right to recover for prospective inheritance, to which the widow was not entitled, as well as for the pecuniary loss she sustained by Holloway's death; and without requiring the jury, as to either element, to reduce the damages to present worth. In referring to defendant's assignment of error, on page 4 of plaintiff's brief, the word "primary" is used in connection with the widow's loss. This is obviously unsound. Her loss is not divisible. It is but *one* loss.

V.

On page 27 of plaintiff's brief, comment is made of language used in our brief in the Court of Appeals that:

"The opinion on the former appeal also approved as correct Instructions Nos. 1, 2, 4 and 7, given on the first trial, and which same instructions were given on the last trial. So that we will not criticise these instructions in this brief."

We do not see how this statement helps plaintiff. Quite the contrary is true. The statement merely recognizes a well-settled rule of practice in the Court of Appeals that instructions which have once been approved are the law of the case on all subsequent appeals (*L. & N. R. Co. v. Payne*, 133 Ky. 539; *Mut. Benefit L. I. Co. v. O'Brien*, 149 Ky. 514; *Hopkins*

v. Adam Roth Grocery Co., 105 Ky. 357; Straight Creek Coal Co. v. Huddleston's Admr., 147 Ky. 94). This rule certainly foreclosed further discussion in that court that Instruction 2 was wrong. Nevertheless, we raised and saved the question in the lower court and, as we have shown, also raised it, without pressing it, in the Court of Appeals. But nothing short of a decision of *this court* could set the Kentucky court right on the proposition; and this the Kelly and Gainey cases did (C., N. O. & T. P. R. Co. v. Jones' Admr., 177 Ky. 485; L. & N. R. Co. v. Asher's Admr., 178 Ky. 67, 75).

VI.

It is sufficient to say of the four cases cited at the top of page 32 of plaintiff's brief, that none of them decides the question plaintiff urges here; that this court will not examine and decide the question of error in not requiring the jury to reduce the damages to present worth because that question was not stressed by defendant in argument or directly passed upon by the Court of Appeals. Of those four cases, the opinion in Hall's case expressly excepts from the rule there stated an error "fundamental in character." The Gainey case, *supra*, holds that an improper measure of damage instruction in an action under the Federal Act is fundamental in character. And, in Duvall's case, the court excepted from the rule a case where "there was necessarily present a

definite issue as to the correct construction of the Act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error" (citing cases). This is just what this court held in Gainey's case was the effect of misinstructing the jury as to the measure of damages. And the error in this respect was certainly as great, if not greater, in the case at bar as it was in Gainey's case.

VII.

On page 33 *et seq.* of plaintiff's brief certain general principles are discussed to the effect that where the pleadings and evidence are the same on the second trial no instructions should be given the jury except those given on the first trial and approved on the first appeal. But, obviously, these principles are inapplicable where both the pleadings and the evidence are different on the second trial, as they were in this case. (1) As to the pleadings: On the first trial there was no averment by plaintiff that Holloway's widow was dependent upon him for support; that she had a pecuniary interest in his life; or had suffered financial loss by his death. These allegations were first made in a "second amended petition" filed by plaintiff only a few days before the second trial began (R., 129). (2) There was no evidence on the first trial as to the widow's dependency. This is conceded on page 25 of plaintiff's brief. Therefore, the case was entirely new, both on the

pleadings and evidence, on the second trial, on the question of the proper measure of damages, which this court held in Kelly's case (241 U. S. on p. 491) "is inseparably connected with the right of action."

VIII.

Beginning on page 41 of plaintiff's brief, the argument is attempted that Instruction No. 2 "sufficiently meets the requirements of the Employers' Liability Act" and properly presented the issue to the jury, "especially so in the absence of evidence heard or offered by the railroad company upon the question of present cash values, and in the absence of a proper instruction offered on this issue." We have examined the record in this court in Kelly's case, and find there was no evidence before the jury there as to present worth. One witness was asked a question, predicated on proof as to what pecuniary assistance Kelly's next of kin received from him in his lifetime, as to what the present worth of the aggregate of benefits would be. He said he did not know. There the matter rested. Nevertheless, this court held it was the duty of the court to give the jury an instruction limiting them to finding present worth, rejected the reasoning of the Court of Appeals that to require a jury to compute present worth "is more than ought to be asked of any one less qualified than an actuary"; and held (241 U. S. on p. 491) that even though the computation might be attended with dif-

ficulty, it was, nevertheless, required by the Act. As we have shown in our original brief, the tables in Sprague's and Ray's books provide a comparatively easy method of making such calculations. Furthermore, plaintiff says he was content to leave this phase of the question to the jury without evidence; and we do not recognize that defendant was under any different or greater obligation than was plaintiff to introduce evidence on this feature of the case. Indeed, the plaintiff had the burden of proof thereon.

And, touching the assertion that defendant did not offer a proper instruction on this issue, we have only to refer the court to Instruction "a." It speaks for itself. It is not essential that the instruction should have been correct in order that the error in refusing to instruct the jury to reduce the damages to present worth may avail defendant. *C. & O. R. Co. v. DeAtley*, 241 U. S. 310, cited and quoted from on pages 20, 21 of our original brief, and cited on page 57 of plaintiff's brief, is conclusive of the proposition that if Instruction "a" as offered by defendant was not correct, the court should have prepared and given a correct instruction on that point. It was sufficient, therefore, in order for defendant to raise and save the question that it was entitled to have the jury directed to reduce the damages to present worth, for defendant to offer Instruction "a." How opposing counsel can argue that Instruction 2, without some such limitation as Instruction "a" or one of similar import would have imposed, authorized

the jury to reduce the damages to present worth, and that it is to be presumed this is what the jury did, is beyond our comprehension. The size of the verdict completely refutes the argument. So does the reasoning of the opinion of the Court of Appeals, from which it is even more evident that the court would not have been "able to reach a conclusion sustaining the verdict" for \$25,000, if required to be reduced to present worth, than it was with respect to the \$16,000 verdict (\$9,000 less than the one here) in Gainey's case (141 U. S. on p. 496). Or, considering the proposition as argued on pages 48 and 49 of plaintiff's brief, to the effect that the jury, as reasonable men, must have appreciated the earning value of the money to be presently awarded by them, and to have taken that fact into consideration, it is sufficient to say that the present worth tables, discussed in our original brief, taken in connection with the evidence as to the loss of pecuniary benefits the widow sustained by Holloway's death, conclusively demonstrate that the jury did not do that which opposing counsel says they were presumably capable of doing without evidence—they did not reduce the damages to present worth. On authority of the Gainey case, the size of the verdict is all the evidence we need on this point.

IX.

Certainly, plaintiff has no ground of complaint (his brief, p. 53) that in arguing the case in the Court of Appeals we gave the widow the benefit of \$50 a month income from her husband instead of \$40. We think the latter sum is nearer correct. But we undertook to show that even if she received the larger sum, the award, without being reduced to present worth, should not have exceeded \$17,166, as against \$25,000 the jury awarded.

There is much said in our opponent's brief about the 6% rate of interest mentioned in Instruction "a," and in argument in the lower court. It is not necessary for us to sustain that as the correct rate of interest in order to show that the damages are very excessive. We go into this question fully in our original brief, pages 21 *et seq.*, and show that even at 4% interest the verdict is substantially excessive.

We think *R. & D. R. Co. v. Elliott*, 149 U. S. 266, answers the argument on page 56 of plaintiff's brief that the amount the widow received in her husband's lifetime was not the criterion whereby the jury were to determine what she might have received from him in the future if he had lived. Once we get away from the standard of what the beneficiary had been receiving in the benefactor's lifetime, we open "the door to a speculation of possibilities," as held in the case last cited. Such is also the view of the Court of Appeals as shown by *L. & N. R. Co. v. Stock's Admr.*,

106 Ky. 42, and interpreted by Judge Guffy's dissenting opinion, pages 50 *et seq.*

The fault with the life-tables as evidence, referred to on page 58 of plaintiff's brief, as applied to hazardous railroad employments, is that they are too liberal in favor of the plaintiff, as shown by the quotation made on page 22 of our original brief from the Stewart case.

X.

Under division III of plaintiff's brief, page 59, an attempt is made to show that the jury were not authorized by the instructions to award plaintiff anything on account of the widow's prospective loss of inheritance. We do not care to argue this question further than is done in our original brief, except to say that if it is true that the jury did not award anything on this ground, and that the whole of the \$25,000 verdict was intended only as compensation to the widow for the loss of pecuniary benefits she received from her husband in his lifetime and had reasonable expectation of receiving from him in the future if he had not been killed, there is no possible way, when the present worth principle is applied, to sustain by anything in the record the award of the jury. (Gainey case; Chafin v. N. & W. R'y Co., 93 S. E. 822.)

Without further argument, we ask, in our original brief, that the judgment of the Court of Appeals

of Kentucky, which affirmed the judgment of the Henderson Circuit Court, be reversed.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

N. POWELL TAYLOR,
JOHN C. WORSHAM,
Of Counsel.

January 24, 1918.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 200

LOUISVILLE & NASHVILLE RAILROAD CO.,
Plaintiff in Error.

vs.

E. S. HOLLOWAY,

As Administrator of the Estate of John G. Hol-
loway, deceased.

In Error to the Court of Appeals of the State of
Kentucky.

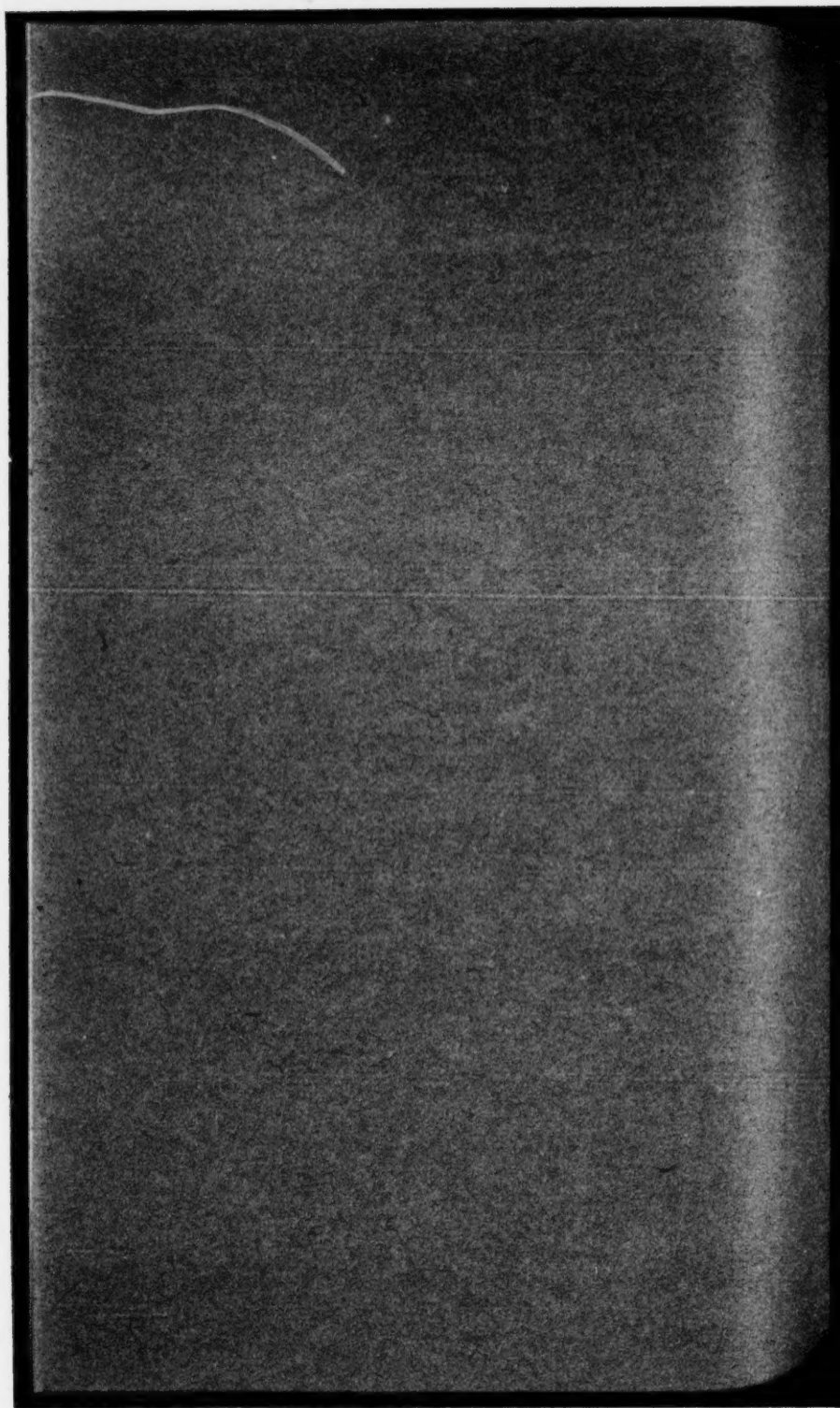
BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

JAS. W. CLAY,
Counsel for Defendant in Error.

Of Counsel—

J. F. CLAY,
A. Y. CLAY.



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Supreme Court of the United States

OCTOBER TERM. 1917.

No. 209

LOUISVILLE & NASHVILLE RAILROAD CO.,
Plaintiff in Error.

vs.

E. S. HOLLOWAY,

As Administrator of the Estate of John G. Holloway, deceased.

In Error to the Court of Appeals of the State of
Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

"In May, 1912, John G. Holloway, a locomotive engineer in the service of the appellant company, while operating a freight train between Pensacola, Fla., and Montgomery, Ala., was killed in a collision between his train and a work train.

"His administrator qualified in Henderson

County, Kentucky, and instituted this action in that county under the Federal Employers' Liability Act to recover damages for his death. On the first trial of the case there was a verdict and judgment for \$32,900, but on appeal to this court the judgment was reversed in an opinion that may be found in 163 Ky. 125. On the return of the case to the lower court there was a re-trial with a verdict and a judgment thereon for \$25,000 to reverse which this appeal is prosecuted.

"It does not appear necessary to state with any elaboration the facts surrounding the collision in which Holloway lost his life, because there was sufficient evidence to warrant the jury in finding that Holloway while free from contributory negligence came to his death on account of the negligence of the flagman of the work train with which the engine Holloway was on collided. And this issue of fact was submitted to the jury under proper instructions, and the jury necessarily found that the negligence of the flagman was the direct cause of the collision.

"But, briefly, the evidence shows that the work train had stopped at a point between two stations; that it was the duty of the flagman of the work train to go back the distance required by the rules and stop the freight train in charge of Holloway by signals and torpedoes, and that he failed to give the required signals or any signals; that Holloway not being warned of the presence of the work train on the track at the place where the collision occurred, was going a good rate of speed when his engine, while rounding a curve in the track, ran into the work train."

We adopt the above, quoted from the opinion of the Court of Appeals of Kentucky delivered upon the second appeal of this case, as a sufficient statement of the facts of the case in so far as they are necessary to be stated at this time. Further facts will appear

in the course of the argument. On this second appeal the judgment for \$25,000 was affirmed and the plaintiff in error,—appellant and defendant in the lower courts, now asks this court to review the judgment of the Court of Appeals of Kentucky, upon writ of error to that court.

In presenting our argument of the case in this brief we shall refer to the plaintiff in error as the railroad company, and to the defendant in error as the administrator. As they appear in quotations from cases cited herein or from other quotations appearing herein, the italics used are our own. The opinion of the Court of Appeals upon the first appeal to that court is not copied into the printed record, but as stated, it may be found reported in 163 Ky. 125. The opinion upon the second appeal is copied in the printed record herein at pages 167-174 and may be found reported in 168 Ky. 270. The assignment of errors upon this writ of error, may be found at page 220 of the record. It will be observed that in this assignment of errors there are quite a number of paragraphs dealing with several phases of the same question. But, as numbered by the railroad company there are three separate assignments, numbered respectively—First, Second, Third. In a letter bearing date the 27th day of December, 1916, ~~Mr.~~ B. D. Warfield, leading counsel for the railroad company wrote the undersigned as follows: "I shall not press in the Supreme Court the second assignment of error, but

only the first and the third assignments." At this time we have not been furnished with a copy of the brief of opposing counsel, but in view of the above statement, we leave out of consideration the second assignment, and confine our discussion to the first and the third assignments.

STATEMENT OF QUESTIONS INVOLVED.

In both the first and the third assignments of error, complaint is made that the verdict of the jury is excessive. This may be treated as the first question raised. It is further claimed that so much of instruction No. 2 given by the trial court as submits to the jury the measure of damage is erroneous in that it did not limit the jury in assessing damages,—(A) to a sum the present cash value of which represents the widow's primary loss, and—(B) in that it permitted the inclusion of problematical gifts of savings which decedent might make to his widow during his life had he lived, or, as it was contended in the lower court, in that it permitted the jury to allow damages for loss to the estate of the deceased as well as the widow's individual loss. And it is claimed that instruction "A" offered by it and refused by the court would have cured this alleged defect in instruction No. 2. The Third assignment reiterates the complaint of excessive damages, and then alleges as error the alleged action of the Court of Appeals in holding, as the railroad company asserts, that the jury was

entitled to take into consideration, in awarding damages one-half the savings which decedent would have accumulated had he lived. The third assignment is so closely related to the latter part of the first assignment, which we have lettered (B), that it should properly be treated as raising substantially the same question. As we construe the first and the third assignments of error, there are then, three general propositions presented for the consideration of this court upon this writ of error, as follows:

First—Excessive Damages.

Second—The alleged error in not limiting the jury in awarding damages to a present cash value.

Third—The alleged error in authorizing a recovery for damages based upon what the widow might have received from the savings or estate of the deceased had he lived. We shall, therefore, discuss these as the three general questions raised, and in the order stated. We wish, however, at the very outset of the discussion, to say, that while it appears to us that these are the three questions attempted to be raised by the first and the third assignments of error, we do not agree with counsel for the railroad company in this construction of the instruction given or the one refused, or of their construction of the opinion of the Court of Appeals herein.

ARGUMENT.

I. Excessive Damages.

The opinion of the Court of Appeals of Kentucky under review, treats this question as the principal one raised in that court by the railroad company, and by far the greater portion of the opinion is devoted to disposing of it. As the court said, Record p. 169,—

“The principal ground, however, urged for reversal is that the damages are excessive * *”.

And again it says at page 173 of the Record,—

“It does not appear and is not urged that in hearing and disposing of this case the jury were influenced by passion or prejudice. The complaint is rested solely on the ground that the assessment of damages is excessive”.

And this was the main question raised, and the principal ground relied upon in that court,—not with reference to instructions given or refused,—but just the broad, general proposition that under the evidence the jury had awarded a sum largely in excess of the proven pecuniary loss of the widow, and that the size of the award indicated this. This was, admittedly, an important question in the State Courts, because there was the place for such questions to be determined; but, having been passed upon by both the lower courts, it has lost its importance upon this writ of error.

The question of the contributory negligence of the deceased, and the diminution of damages in proportion thereto, was properly submitted to the jury

under appropriate instructions, which are not now complained of. The Court of Appeals found as a fact that the jury was warranted in finding from the evidence, "that Holloway *while free from contributory negligence*, came to his death on account of the negligence of the flagman of the work train * * * and the jury necessarily found the negligence of the flagman was the direct cause of the collision". (R. 167). Some complaint of this finding is made under the Second assignment of errors, but, in view of the letter of counsel mentioned above, showing its abandonment, we need not discuss that complaint here. We quote these findings of fact upon this point only for the purpose of showing that in considering the matter of excessive damages, all question of contributory negligence and the diminution of damages in proportion thereto, or on account thereof, should be eliminated.

The Court of Appeals further made the following findings of fact as shown at page 170 of the record,—

"In order that the facts before the jury furnishing the data on which the assessment was made may be understood, we think it well to set out briefly what the record shows on this subject. The deceased, Holloway, at the time of his death was thirty-four years old. He was in perfect health and a man of exceptionally fine habits. He was sober, capable, industrious, ambitious and saving; devoted to his wife and fond of his home life. He started with the company as

a laborer and was promoted from time to time until, in the course of a few years, he had reached the position of a regular locomotive engineer. During the first years of his married life he had only been getting from fifty to one hundred dollars a month, but after this his salary was raised to one hundred and fifty dollars a month, and a few months before his death he had been promoted to the place of a regular engineer and was earning *over* two hundred dollars per month. He had been married about four years and a half to the woman he left a widow, and who had no income or means of support during their married life other than such as she received from her husband. It was his habit when he received his wages, which was paid in money each month, to take it home and give it to his wife, who put it in bank to their joint credit only using such part as was needed for their living expenses.

"At the time of his death she had on deposit to their joint credit about eight hundred and fifty-five dollars, that had been saved from his earnings; and in addition to this there was about three hundred and twenty-five dollars due to him from the company as his wages for about a month and ten days before his death. It might be properly stated here that the bank deposit was the savings from his salary after it had reached one hundred and fifty and two hundred dollars per month, as previous to that time his salary had only been from fifty to one hundred dollars per month, so that until within a few months before his death little could be saved after paying the living expenses. It may therefore safely be said that he had saved out of his wages over eleven hundred dollars, the amount on deposit and due him from the company, in the last year of his life, after paying the living expenses of himself and wife.

"This brief statement shows in a very striking way the fine character of man the deceased

was, and gave to the jury, as we think, the right to give to his widow as compensation the very largest sum that a fair estimate of the pecuniary loss she sustained would justify."

We have quoted thus at length from the opinion not only because of the bearing these findings have upon the question of excessive damages, but also upon the question later to be discussed with reference to the alleged error in authorizing the inclusion of damages based upon what the widow might have received from the savings of the deceased had he lived, that being the third and last question to be discussed. It seems to us that, so far as the mere naked question of excessive damages is concerned, these facts, found by the Court of Appeals to be established by the evidence are sufficient to sustain this, its conclusion,—

"If the jury as urged by counsel, assessed the damages at too large a sum, or allowed the widow, as is said, an amount largely in excess of the pecuniary loss she sustained, this finding cannot be attributed to any fault in the instruction (the one on contributory negligence) nor are we prepared to say that under the evidence and the reasonable inference to be drawn therefrom, the amount awarded is substantially more than the facts justified".

We would be content to rest this question of excessive damages upon the record, and these findings and conclusions of the Court of Appeals, if it were necessary, or if the question of excessive damages was an open one upon this writ of error, and subject to review by this court, which is not the case. In

Southern R. Co. vs. Bennett, 233 U. S. 80, this court said,—

“The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by *Michigan C. R. Co. vs. Vreeland*, 227 U. S. 595, * *, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: the deceased was making not more than \$900 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than \$700 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from \$10,000 for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of \$20,000 out and out. It may be admitted that if it were true that the excess appeared as a matter of law,—that if, for instance the statute fixed a maximum and the verdict exceeded it,—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. *Lincoln vs. Power*, 151 U. S. 436, 38 L. Ed. 224, 14 Sup. Ct. Rep. 387; *Herencia vs. Cuzman*, 219 U. S. 44, 45, 55 L. Ed. 81, 82, 31 Sup. Ct. Rep. 135. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law.”

It will be observed that the argument in the above case is the same as the argument in this case,

not only as shown throughout the record in the lower court, but as shown by the assignment of errors before this court, wherein it is said that the verdict is grossly excessive "in that the verdict so returned, if placed at interest, would yield an annual income greater than the amount the widow would have received if decedent had lived, and would leave the corpus intact in perpetuity". This statement is incorrect when applied to the facts of this case, in that it assumes the interest should be calculated at six per cent. the legal rate, and also assumes as a matter of law that the widow's pecuniary loss could not have exceeded a given sum, both of which are wrong,—but here it is only necessary to say that if these assumptions were, either the one or the other or both, true, unless the excess appears as a matter of law, which is not the case, or unless the result of erroneous instructions, which is not the case as we shall endeavor to show,—then it was a matter to be dealt with by the State courts, and does not present a question for re-examination by this court upon a writ of error. See also, *St. Louis, I. M. & S. R. Co. vs. Craft*, 237 U. S. 661.

II. Alleged Error of the State Court in Not Limiting a Recovery to a Present Cash Value.

In the discussion of this proposition, we contend at the very outset, that in the assignment of errors shown at page 220 of this record, is the first time,

from the beginning of the case to its final conclusion in the Court of Appeals of Kentucky, that this complaint appears. It was not made in the trial court, we contend, nor in the Court of Appeals upon either appeal, and was not considered or passed upon, directly or indirectly by that court. It is patent to us that the complaint as now made is an after thought, and an effort to raise the question upon authority of the two cases of *C. & O. Ry. Co. vs. Kelly*, 241 U. S. 485, and *C. & O. R. Co. vs. Gainey*, 241 U. S. 494, decided before the assignment of errors herein was filed, but after the judgment of the Court of Appeals had become final. We call attention to the following significant facts:

The assignment of errors was filed herein on June 13th, 1916; the Kelly and Gainey cases, just mentioned, were decided on June 5th, 1916, eight days previously; a petition for rehearing was filed by the railroad company in the Court of Appeals on April 28th, 1916, (Record, 174); the administrator's response to the petition for rehearing was filed May 9th, 1916, (Record, 190); on the same day the railroad company filed a reply to this response, (Record, 214); and the petition for rehearing was overruled and the judgment of the Court of Appeals became final on May 11th, 1916, (Record, 217). All these steps were taken before the opinions in the Kelly and Gainey cases were delivered. The opinion of the Court of Appeals was delivered on February 3rd,

1916. In neither the opinion of the Court of Appeals, the petition of the railroad company for a rehearing, the administrator's response thereto, the reply to such response, nor the order of the Court of Appeals overruling the petition for rehearing, is this question decided, presented, or referred to in any manner, shape or form. This question was properly before this court for its consideration in the Kelly and Gainey cases, because the Court of Appeals treated it as properly raised and decided it, but it is not properly before this court in the instant case, as we contend, and propose to show. There will be several other matters for discussion under this second general proposition, in the event the court should not uphold our contention in the premises just stated, but we discuss this phase of the question first.

A somewhat lengthy review of the record becomes necessary to sustain our contention here made and we ask the court to bear with us with patience while we present this review, believing as we do that the court will not only then more readily see the grounds of our position, but it will save the court some time and labor in searching the record, by having the pertinent portions before it in this form. In considering this question we also ask the court to bear in mind that the objection here under consideration is not a general objection and complaint that the jury did not reduce its verdict to a present cash value, because that fact does not and could not appear from

its verdict, and if the complaint now made were to be rested upon the ground that the size of the verdict would indicate such to be the case, then it is met by the argument presented and authorities cited upon the question of excessive damages. The complaint now made, and the error now relied on is the alleged error in giving and refusing instructions, as a result of which it is now claimed the jury was not confined to a present cash value in making its award, and it is this specific question which we claim comes as an after thought.

The instruction given by the trial court upon the measure of damages constitutes the last part of instruction No. 2, may be found at page 139 of the printed record herein, and is as follows,—“the measure of recovery if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed, to-wit: \$50,000.00, * * *”. This is the only instruction given upon the measure of damages.

Turning to the opinion of this court in the Kelly case, *supra*, we find that the trial court there gave an instruction very much like the one given in this case as far as the one given in this case goes; but, instead of stopping where the trial court stopped in the

instant case, the trial court in the Kelly case went further and said,—

“If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant, *which must not exceed the net earnings of Mat Kelly had he lived*. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sums which the jury may find from the evidence and fix as the pecuniary loss above described, which each dependent member of Matt Kelly’s family may have sustained by his death”.

It further appears that an instruction was requested by the defendant and refused, that the jury should “fix the damages at that sum which represents *the present cash value* of the reasonable expectation of pecuniary advantage to said Addie Kelly during her widowhood,” etc. And upon this state of the record, this court among other things said,—

“Laying aside questions of form the Court of Appeals treated the instruction given and the refusal of the requested instruction as raising the question ‘that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount?’ Defendant’s contention was overruled upon the ground that the whole loss of the beneficiaries is sustained at the time of the death of the party in question, the court saying, ‘While the loss is, in a measure, future support, the father’s death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father’s support is not so difficult to estimate, and the average jury man is competent to compute it, but to figure in-

terest on deferred payments with annual rests and reach a present cash value of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary' (160 Ky. 303)".

This court then proceeded to hold that the Court of Appeals was in error in its conclusion as above outlined, and that the verdict of a jury, under the Employers' Liability Act, should be made upon the basis of their present value, and not upon the basis of a lump sum equal to what would be received during the estimated term of dependency.

In the Gainey case, *supra*, this court found that the Court of Appeals treated the case as having properly raised the same question as that raised in the Kelly case, and reversed the case for the same reason, in doing which it said,—

"A reading of the opinion of the Court of Appeals in the present case (162 Ky. 427) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict".

So that, in each of the two cases mentioned it affirmatively appears from the opinion of the Court of Appeals that the question now under consideration was treated as having been properly raised and was in each instance considered and directly passed upon by the Court of Appeals. In the case at bar there is nothing in the opinion of the Court of Appeals to indicate that the question decided

in the Kelly and Gainey cases was properly or at all presented to or in any way involved in that court, nor is it passed upon or decided either in the opinion or in overruling the petition for rehearing. And we maintain that a search of the record herein will disclose that the question was not relied on or presented in the lower court or at all.

Now just what was presented to and decided by the Court of Appeals in this case? The two proper places to look for an answer to that question are, we submit, 1st, the opinion of the court, and, 2nd, the petition for a rehearing filed by the railroad company after the opinion was handed down, which may be found at pages 175 to 190 of the record herein. Every question relied upon in the Court of Appeals was directly passed upon and discussed in the opinion of the court. If this were not true, or if the Court of Appeals failed to pass upon any question that had previously been presented to it, it was not only the privilege but the duty of the railroad company to call the court's attention to such omission when it filed, as it did, its petition for a rehearing. Yet this question is not suggested there.

The Court of Appeals passed upon these questions, and none other,—First, There is the question of the sufficiency of the allegations of the amended petition, and the evidence thereunder to meet the requirements of the Employers' Liability Act upon the question of dependency and pecuniary loss of the

widow. This amendment was filed under leave granted by the Court of Appeals in its first opinion. This contention was overruled by the court and is not now complained of upon this writ of error. Second, There was next raised and passed upon the question of the jurisdiction of the court because of the Kentucky statute authorizing a verdict by three-fourths of the jury. This contention was also decided adversely to the railroad company, and having been subsequently put at rest by this court in *Minneapolis & St. L. R. Co. vs. Bombolis*, 241 U. S. 211, and other cases, that question is not raised on this writ of error. Third, The objection to the instruction on contributory negligence is next passed upon, but that question is not now relied upon here. Fourth, The next question presented in the opinion is that of excessive damages. In discussing this question the court presents the instruction upon the measure of damages, and shows by its opinion,—(A) That the only ground of criticism made or passed upon with reference to that instruction is the one that it authorized the jury to allow the widow for the damage done to the decedent's estate, as well as for the damage she sustained individually" and the court expressly held this was not true. (B) Its findings of fact are then set forth by the court to show the jury had the right to award a large amount as damages under the evidence. (C) The court then says,—“But counsel for the railroad company argue that under no state of the case should

the recovery have exceeded \$17,166.00. They get this amount by multiplying the life expectancy of the deceased by fifty dollars a month, or six hundred dollars a year, that being the annual sum it is claimed the husband was contributing for the support of his wife at the time of his death". We may remark in passing that such an argument as this, which the court said was made by the railroad company is directly in opposition to the present position with reference to present cash values. We mention this as further evidence that the present question was not relied upon. The court overrules this contention, stating,—“We do not of course know by what method of calculation the jury arrived at the amount awarded, but” * *, and then proceeds to hold that the jury had the right to consider other amounts the widow was deprived of in addition to this \$600.00 a year, and the court shows that instead of being deprived of \$600.00 a year the evidence showed at least \$1,200.00 a year which the jury might have considered. The court does not say the jury did consider \$1,200.00 a year as the widow's pecuniary loss, nor did it say the jury was limited to a finding based on \$1,200.00 a year, but simply made the statement that there was evidence for the jury to calculate on a basis of at least \$1,200.00 a year and was not confined to a basis of \$600.00 a year as argued by counsel for the railroad company. And this conclusion of the court was in direct answer to the railroad's argument that

\$600.00 a year was the limit for the jury to allow. Upon the general proposition of excessive damages, the court said,—

“The federal statute does not fix any rule by which to measure the damages in cases like this, nor is there any statute in this state on this subject. So that the amount to be awarded is not controlled by any statute law. It is left to the jury to say what the finding shall be; and under the settled practice of this court their finding will not be interfered with unless it strikes the mind at first blush as being grossly excessive; or in other words, is so excessive as to appear to have been given under the influence of passion or prejudice”.

And the court holds finally, that while the verdict is large, it was not so large as to justify the court in setting it aside as excessive under the evidence.

It is true the Court of Appeals refers by citation to the two cases of *C. & O. R. Co. vs. Kelly*, 160 Ky. 296, and *Same vs. Dwyer*, 162 Ky. 427, which were subsequently reversed by this court, but they were not reversed upon the points upon which the Court of Appeals cites them. A mere general citation of them in discussing generally the question of excessive damages, and the refusal of the court to interfere with the verdict of a jury, as made by the court in the opinion in this case, cannot be construed as a reference to the question now under discussion, or as a decision of the court upon the question under discussion.

We have presented a review of the opinion of

the Court of Appeals at length, and from beginning to end, not, of course quoting everything that is said, but we have referred to every question decided. There is not a word in the opinion showing that the railroad company complained of the instruction given or the refusal to give the one offered, upon the ground that they did or did not provide for reducing the award to a present cash value. The court does say the measure of damage instruction and the instruction on contributory negligence were complained of, but the opinion itself shows that the complaint upon the measure of damage instruction was addressed solely to that other question, viz.: that it was "calculated to mislead the jury and to induce them to allow the widow for the damage done to the decedent's estate as well as for the damage she sustained individually". And, we say it with full knowledge of the record, and every step taken and argument made, this is the only objection that has ever been made or urged to the measure of damage instruction, or the action of the court in refusing to give instruction "A", offered in the trial court, until the assignment of errors herein was filed.

It is not alone the opinion of the Court of Appeals that shows by its silence that this question was not raised or relied upon, but the petition for rehearing shows we are correct in the statement just made. The opening paragraph of this petition for rehearing (Record, 175) is as follows:

“Because of the magnitude of some of the questions involved, and our firm conviction that the court has decided them incorrectly, we respectfully and earnestly ask the court to grant appellant a rehearing in this case and on such rehearing to withdraw the opinion heretofore delivered and to deliver an opinion reversing the judgment of the Henderson Circuit Court”.

Is it claimed in this petition for rehearing that the court has wrongly decided the question of reducing the damages to a present cash value or that this question was decided at all? Not at all! Is it claimed that this question was presented to the court for its decision and that the court had failed to pass upon it? Not at all. The petition for rehearing is as silent upon this proposition as the opinion of the Court of Appeals is. The petition for rehearing reargues and asks the court to take back its ruling upon the question of the Seventh Amendment to the United States Constitution and the right to trial by jury according to the law of the forum; it also presents the new question that the administrator was not entitled to interest and damages upon the judgment as provided by the practice in Kentucky. As shown this first question reargued has been settled by the *Bambolis* case, *supra*, and the latter question by the case of *Louisville & N. R. Co. vs. Stewart*, 241 U. S. 261. Neither of these questions are relied on here. But the railroad company in this petition for rehearing did very strenuously reargue and present the question of excessive damages, and in doing so still con-

fined itself to the two points relied upon before the opinion was delivered, and which were decided by the court, to-wit: 1st, Because the jury had not, as it was claimed, made any diminution in the damages for the alleged contributory negligence of the deceased; and, 2nd, Because the court had permitted the inclusion of damages for the benefit of the widow the loss of the prospective estate which the deceased might have accumulated had he lived. At page 188 of the petition for rehearing there is cited and quoted a part of the opinion of the Supreme Court of Georgia in *Southern R. Co. vs. Hill*, 139 G. 549, and, notwithstanding the fact that in this quotation the rule of reducing the damages to their present value is incidentally mentioned, yet the railroad company even then does not contend in argument for the application of that rule and did not cite or quote from it to support that proposition, but cited and quoted at length from it only to sustain the proposition that the widow was not entitled to recover for her prospective benefits out of the estate the deceased might have accumulated if he had lived out his expectancy. In other words, there is not the slightest suggestion of a complaint in this petition for rehearing based upon the question of reducing the amount recovered to present values; or the slightest suggestion that any instruction improperly submitted this issue to the jury, or that any instruction offered would have done so.

Is it not patent, therefore, that this question was

not properly raised or presented below and was not regarded as of sufficient importance to be urged, until this court held in the Kelly and Gainey cases that such was the rule?

If it should be argued that while the Court of Appeals does not directly pass upon the question now raised, yet that it was raised and discussed in argument before that court, and it ought to have decided same, our answer is that there was no oral argument in the Court of Appeals and the case was submitted to that court upon printed briefs, and that this question now raised was not even discussed in the briefs filed before that court. The briefs upon neither side are copied into or made a part of the record before this court, and we are not at present prepared to say that they should be or can be properly considered by this court. But if it be proper to consider them, or if they should hereafter by proper proceeding be placed before this court in such manner that they should be considered by the court; or should any claim be made by the railroad company that this question was presented in the State court we ask the court to examine the brief on behalf of the railroad company, filed in the Court of Appeals, very carefully, and in doing so to bear in mind this proposition,—There is a very important distinction between an argument that the jury ignored present cash values in making up its verdict based upon the size of the verdict; and the argument, now made for

the first time, that the instructions were erroneous in that they improperly submitted such issue to the jury. This distinction is strikingly illustrated in the Bennett case, (233 U. S. 80) heretofore cited and quoted from. As in the Bennett case, some reference is made, in its brief, to the question that the jury had allowed a sum which, if invested at six per cent interest, the "legal rate" in Kentucky, it would have yielded an income in excess of the income the widow would have received from her husband had he lived and would leave the principal intact, which was the identical position taken by the carrier in the Bennett case and overruled by this court: but,—and there can be no doubt upon this proposition,—as in the Bennett case it was not asserted, so in this case it has never been asserted that the excess, if any there is, was the result of erroneous instructions to the jury, or that any instruction offered would have cured such alleged error; on the other hand such argument as was made upon this score is made in discussing the question of excessive damages, and is insisted upon solely upon the ground that the size of the verdict was such as to make this manifest.

Sub-section 3 of Rule III of the Court of Appeals of Kentucky is as follows:

"(3) Points and Authorities—Classification of—There shall accompany every brief a classification of the questions discussed. The classification may be indicated by a word which suggests the subject, or by a brief synopsis of it.

The authorities relied on shall be cited under the appropriate heading".

In compliance with the above rule the brief of the railroad company before the Court of Appeals upon the second appeal, dated Dec. 1st, 1915, a copy of which we have before us, has the following,—

"POINTS DISCUSSED AND AUTHORITIES CITED.

"On this appeal, prosecuted to reverse a judgment on a verdict for \$25,000 in a death case under the Federal Employers' Liability Act, it is argued:

"1. That the second amended petition is bad in alleging both too much and too little.

"2. That the widow is not entitled to recover for the loss of what she might have inherited from decedent's estate if he had lived out his expectancy, in addition to recovering her pecuniary loss of support. (Authorities cited).

"3. The trial court erred in instructing the jury that nine or more of their number might return a verdict; and erred in refusing to give an instruction offered by appellant which would have told the jury that their verdict must be unanimous; and erred in refusing to instruct the jury that they must believe from a preponderance of the evidence that appellee had sustained the issues submitted to the jury before they could find in appellee's favor". (Authorities cited).

"4. There is error in the judgment in that the jury did not diminish the damages on account of decedent's contributory negligence". (Authorities cited).

In the above classification of points discussed, we have the railroad's own construction of its own argument, and the points upon which it was asking the Court of Appeals to reverse the judgment of the circuit court, and in it there is no intimation of the question now under discussion being relied upon. The two points in respect of which it claims there was error in the assessment are the same two appearing throughout the record and decided by the Court of Appeals,—relating to the loss to the estate or loss of inheritance, and the failure to diminish damages on account of the alleged contributory negligence of the decedent. That is all.

To go back a little. It appears that there were two appeals in this case the first judgment being reversed. In the opinion on the first appeal the court held instruction No. 2 was proper. This instruction contained the measure of damages, and was given in identical terms on the second appeal. Upon this state of the record the railroad company at pages 2 and 3 of its brief now under consideration, said,—

“The opinion on the former appeal also approved as correct Instructions Nos. 1, 2, 4 and 7, given on the first trial, and which same instructions were given on the last trial. So that we will *not criticise these instructions in this brief.*”

And it did not criticise the measure of damage part of instruction No. 2 except incidentally. The only place in its brief where any complaint at all is made of instruction No. 2, or of the refusal to give

instruction A, which was offered, or where either of these instructions are mentioned is at pages 20 and 21, and we quote all that is said about them there, as follows:

"If the answer shall be attempted to this argument that the bill of exceptions does not show that appellant objected to that part of the closing argument to the jury made by appellee's counsel, *in which the right and duty of the jury to award appellee for the benefit of the widow, damages which decedent's estate sustained in addition to the widow's proven pecuniary loss,* was discussed, we think it is entirely sufficient to say that the appellant asked the court to give to the jury instructions "A" and "E" reading as follows: Here is then copied the offered instructions A and E, and the measure of damage part of No. 2, and the argument then proceeds,—

"Appellant objected and excepted to the giving of that instruction (No. 2) and objected and excepted to the action of the court in refusing to give Instructions "A" and "E", supra, or either of them. This certainly sufficiently raised and saved the question as to the error of the court in giving that part of Instruction No. 2 which we have quoted and in refusing to give Instructions "A" and "E" offered by appellant. *If the court had given the latter instructions and had not given Instruction No. 2 in the form we have indicated, manifestly the argument which opposing counsel made to the jury as to the damages they might award appellee, of which we complain,* and made also to the court in opposition to the motion for new trial, would not have been admissible and would not have been attempted. The argument was made only because of the error of the court in giving and refusing the measure of damage instructions. Appellant having once raised and saved the question by objecting and excepting to the instructions given, and by of-

fering instructions that would have presented the correct measure of damages, which the court refused to give, *it was not necessary to repeat the objection* wherever subsequent error on the point was made during the trial."

Now we say this is all that is said about these instructions in a brief of some 61 printed pages. We have read and re-read the brief to make positive that this statement is correct. We have quoted all that is said in reference to these instructions. Can the court by any possible rule of construction find in this argument the least intimation that these instructions did or did not submit to the jury the question of present cash values? The court will observe that we have italicised certain portions of the above quoted argument,—in the first paragraph quoted complaint is made that it was argued to the jury that a recovery could be had for loss to the estate as well as the widow's pecuniary loss. No such argument was ever made, and the record did not show any such argument or any argument at all; not only this but if any such argument had been made no objection was made to it, and the record showed no objection to it, or to any argumen that was made to the jury. But, in an effort to overcome the failure to object to the alleged argument and to get around that question these instructions are quoted, and it is claimed in the brief, that they constitute such objection, and once having been made it was not necessary to make a direct objection to the argument. And these instruc-

tions,—No. 2 given by the court, and “A” and “E” refused by the court, are quoted and referred to upon this point only. And the argument said to have been made, and which it is claimed they constitute an objection to, is not one relating to present cash values, but one, which the railroad company attempts to construe into one contending for a recovery for loss to the estate of decedent, as well as the widow’s pecuniary loss.

Beginning at page 34 of its brief, and continuing on for several pages the railroad company, in discussing the question of excessive damages, argues that the legal rate of interest is six per cent and that the judgment at that rate “would yield \$1,500.00 a year in perpetuity, and leave the corpus of the sum untouched”, and it is therefore contended that the verdict is excessive: in this connection several authorities are cited, and it is argued that the jury should have reduced its award to its present cash value. But its entire argument in this connection is predicated upon the assumption that the jury had not so reduced its award, and not upon the ground that there was error in the instruction given, or that any instruction offered and refused, covered this point, or would have presented this issue to the jury, or would have cured the defect in instruction No. 2.

The Court of Appeals did not notice this argument in its opinion, nor was it necessary to do so. It

simply held that the amount of the award was not "substantially more than the facts justified". At one place the court says,—“We do not, of course know by what method of calculation the jury arrived at the amount awarded”, and then it proceeds to set forth some of the things for which allowance might properly have been made. Manifestly the court does not attempt to say, and was not called upon to enumerate, all the things for which allowance might have been made, or the things which the jury should have excluded,—it simply says in effect that, including those things which the jury might properly include under the evidence, and excluding the things which should properly be excluded, the amount awarded by the jury is not substantially in excess of compensation for the loss of actual pecuniary benefits the widow, under the evidence, would reasonably have received from her husband had he lived.

We earnestly and respectfully contend that the complaint now made of instruction No. 2, and the alleged error of the trial court in refusing to give instruction “A”, if it was error, because one failed to present, if it did so fail, or the other would have presented, if it would have done so, the idea of present cash values, made for the first time in the assignment of errors, and not made in or presented in the Court of Appeals, comes too late for it to be considered by this court upon this writ of error, and for this reason if for no other, the judgment below should be af-

firmed and upon this point, *Chicago, B. & Q. R. Co. vs. Railroad Com. of Wis.*, 237 U. S. 220; *Gilla Valley G. & N. R. Co. vs. Hall*, 232 U. S. 98; *Bank of Ariz. vs. Thos. Haverty Co.*, 232 U. S. 110; *Seaboard Air Line R. vs. Devall*, 225 U. S. 477.

There is another reason why the railroad company cannot now complain of the alleged error, if any, in giving instruction No. 2, and in refusing to give instruction "A" offered by it. It is settled that in proceedings in state courts involving the application and construction of Federal laws, they must be construed and applied "according to general principles of law as administered in the Federal courts". This was held to be the rule in the Kelly case, *supra*, and in many other cases, but it is equally as true, and so held in the same case, that questions of procedure and evidence, even where Federal laws are involved, are to be determined by the law of the forum. *Minneapolis & St. L. R. Co. vs. Bombolis*, 241 U. S. 211.

The Court of Appeals not having decided this question in its opinion and not having treated it as presented to it, this court will adopt one of two courses,—1st, It will follow the opinion of the Court of Appeals and treat it as not raised, and therefore as not to be decided, or, 2nd, It will review the question as the Court of Appeals would have reviewed if it had been before that court for review according to the rules of procedure and evidence prevailing in that

jurisdiction. We have discussed the 1st proposition; we now discuss the 2nd one.

We have heretofore shown that upon the first appeal of this case instruction No. 2, including the measure of damages under the Employers' Liability Act, and instruction No. 2 on the second trial are the same. Upon the first trial of the case the record does not show that instruction No. 2 was objected to as not presenting to the jury the question of present cash values, and the record could not show it because such an objection was never raised to that instruction. The record also shows that certain instructions were offered on the first trial and refused by the court, but none were offered suggesting this question in any way. (R. 122-123). Instruction No. 2 was objected to upon the first appeal solely upon the ground that there was not sufficient evidence to sustain certain propositions therein presented to the jury.

Under the law and procedure prevailing in Kentucky, the time for the railroad company to criticise this instruction and present its objections thereto, and to offer instructions which it desired given was upon the first trial of this case. Such objections as it made to the 2nd instruction upon the first trial and the first appeal were overruled by both the trial court and the Court of Appeals, and upon the first appeal the court expressly approved the 2nd instruc-

tion, and directed that it be given along with others outlined by the court in its opinion, on another trial. Upon that question the decision of the Court of Appeals on the first appeal was final. It is a well settled rule of practice in Kentucky that when an instruction given upon one trial of a case as embodying the law of the case is approved by the Court of Appeals, and other instructions are directed to be given, those instructions so approved and directed to be given become the law of the case and are binding alike upon the trial court and upon the parties to the action in any subsequent trial upon the same issues and substantially the same evidence. The decision of the Court of Appeals in such case, is not only binding under the same issues and the same evidence upon questions actually decided by the court, but also upon questions that could and should have been presented at that time. This rule does not prevent the raising of new issues by subsequent pleading, or by the introduction of new evidence, but is confined to the issues then formed and to such questions as could and should have been presented under the evidence then before the court upon those issues. This rule has been adopted upon the idea that every litigant is entitled to his day in court, but having been afforded it he cannot, on a subsequent trial take advantage of his failure to present such questions for the court's consideration as he can avail himself of, or desires to avail himself of at the time, unless such new question

is presented by new pleadings, or by new evidence not before the court at the time of the first decision.

Upon the reversal of the first judgment in this case, and its return to the lower court, an amended petition was filed by the Administrator, under express leave granted by the Court of Appeals, pleading the dependency of the widow and her pecuniary interest in the life of her husband. The railroad offered to file an amended answer pleading the Seventh Amendment to the United States Constitution, and raising the question of the impropriety of a three-fourths verdict by the jury. This amendment of the railroad company was refused, not upon the ground that it came too late, but upon the ground that it presented no legal defense,—still its tender permitted the railroad to rely upon that defense to the same extent as if it had been permitted to be filed. These were the only new issues found or presented by the pleadings. Except that the evidence on behalf of the administrator was more complete and gone into more in detail upon the question of the widow's dependency and pecuniary loss to meet the allegations of the amended petition filed, the evidence heard upon the second trial was substantially the same as that heard upon the first, and most of it was identically the same, the same depositions having been read on both trials. This additional evidence upon the question of the widow's dependency and her pecuniary loss justified the raising by the railroad company of the

new question that the second instruction authorized the jury to allow damages for loss to the estate of decedent, in addition to the widow's pecuniary loss, and justified it in offering an instruction to cure this alleged defect if it existed, because that issue is based upon the new evidence heard at the second trial. It was for these reasons that upon the second appeal the Court of Appeals treated the new questions raised by the pleadings and the evidence as properly raised, and therefore it decided them. But with the question of instructions directing the jury, in particular terms to reduce its award to a present cash value, and to any alleged error growing out of giving or failing to give a particular instruction on this score, no new pleadings and no new evidence were before the court upon the second trial that was not before the court upon the first trial, and the railroad company having failed to take advantage of its right to raise this question upon the first trial, it was too late for it to do so upon the second trial, and there was nothing for the trial court to do at that time except to give the instructions the Court of Appeals directed it to give, and to reject all instructions offered by either side, except such as came within the excepted class above mentioned. If this be true then it was not error, and could not be error for the court to give instruction No. 2, and to refuse instruction "A", upon this question, even if as an original proposition instruction

No. 2 should not have been given, and instruction "A" should have been given.

That this is the rule of practice and procedure in Kentucky is shown by the following quotations from adjudged cases:

In *Carter Coal Co. vs. Hill*, 171 Ky. 832, the Court of Appeals said,—

"It would seem, however, to be hardly necessary for us to repeat the well established rule that the opinion upon the first appeal stated the law of the case for all subsequent proceedings, and that it is binding upon the Circuit Court and this court alike".

In *Borderland Coal Co. vs. Kerns*, 171 Ky. 628-629, it was said,—

"Upon a second trial the plaintiff recovered judgment for \$5,000.00 from which this appeal is prosecuted. The evidence heard upon the two trials is almost literally the same. By far the major portion of it was by deposition, which were read upon both trials, with the exception in those taken by the plaintiff the objectionable testimony pointed out by the first opinion was not read to the jury on the second trial. What has been said with reference to the identity of the testimony heard upon the two trials may, with equal correctness, be said with reference to the instructions given to the jury upon the two trials; while those given at the last trial may not be in the exact verbiage of those given upon the first trial so as to entitle the former to be called the verbatim of the latter, they are, to all intents and purposes the same. * * *

"Considering these objections in the order mentioned, it is sufficient to say that the evidence as to the incompetency of the motorman is

the same as it was upon the former trial. A peremptory instruction was insisted upon at that trial, and the refusal to give it was assigned and argued as error upon the first appeal. The contention was denied, and, under repeated rulings of this court, it cannot be considered on this appeal”.

In *United Talking Machine Co. vs. Metcalfe*, 174 Ky. 136, it was said:

“Nothing more is shown upon the last trial than was shown upon the first trial as a legal excuse for defendant’s failure to read the writing which he signed. It would seem, then, that the well recognized rule of practice prevailing in this court to the effect that the opinion upon the first appeal becomes the law of the case under substantially the same facts, should be applied here”.

In *Wall’s Exor. vs. Dimmitt*, 141 Ky. 715, the court quoted with approval from *United States Fidelity & Guaranty Co.*, 27 Ky. Law Rep. 392, as follows,—

“It is elementary that on the second appeal, the opinion of first appeal must be treated as the law of the case, and all questions which were then presented and properly before the court are as conclusively settled, though not referred to in the opinion, as if each is specifically mentioned and considered”.

In *Louisville R. Co. vs. Osborne*, 171 Ky. 348, complaint was made of certain instructions given upon the second trial of a case which had been approved by the Court of Appeals upon an appeal from a prior

judgment which was reversed. At page 354 the court said,—

“A similar contention, with reference to instructions upon the second trial of the case, was made in the case of *L. & N. R. Co. vs. Selser's Adm.*, 149 Ky. 162. But it was held in that case that the instructions upon the last trial conformed substantially to those indicated as being the correct ones in the first opinion. The evidence upon each trial was substantially the same, as in the instant case. It was held therein that the law of the case was settled in the former opinion, and *that upon the last trial the court substantially followed the directions of this court in the first opinion, and that there should be no other instructions given, other than those directed by the first opinion.* According to our view, that case, and the one we have here, are similar, in that we fail to see wherein the trial court upon the last trial failed to follow substantially the directions given in the first opinion in this case”.

In *Title Guaranty & Surety Co. vs. Hay*, 175 Ky. 677, the court said,—

“The pleadings being the same upon the second trial, and the proof substantially the same,—Whiteside's competent testimony taking the place of Smith's incompetent testimony admitted upon the first trial,—it only remained for the trial court to give instructions corrected in the respects indicated in the former opinion. This it did; and, under the rule that where a case has been reversed for errors in the instructions, the opinion of this court states the law of the case in subsequent trials under the same pleadings, and substantially the same evidence, *the trial court did not err in refusing to give the other instructions asked by the appellant*”.

In presenting this matter to the court we are not

unmindful of the fact, that in a line of cases this court has held that the first opinion of a state court reversing the trial court and remanding the case for further proceedings is not final, and may not be made the subject for review by this court until such subsequent proceedings are had, and then the whole case may be brought here for review on writ of error to the state court, and that this court is not bound by a rule of practice in the state court making the opinion on the first appeal final as embodying the law of the case, where the operation of such a rule will deprive the opposing party of a right, privilege or immunity properly set up and claimed in the state court. Nor does our position in this respect conflict with this line of divisions. The point of distinction lies in the fact that in the instant case the asserted right was not properly set up or claimed in the state court under the rule of practice prevailing in that court. This rule of practice applied here will not deprive the railroad company of any Federal right, because it had full and abundant opportunity to assert such right on the first trial and on the first appeal. And if it has no right to set up or assert this claim at the second trial, such lack of right is not the result of the state rule of practice or procedure, but is the result of the failure of the railroad company to assert its right at the proper time and when it had a full, free and complete opportunity to do so, under the state practice.

Or if it be argued that the Court of Appeals did not decide the case upon this rule of practice, our answer is that the Court of Appeals could not have done so in this case, because the question now at issue was not before it, and the fact that it did not mention this rule of practice is further evidence that the Court of Appeals did not consider the question now at issue or regard it as presented for its consideration.

Thus far we have discussed this Second proposition as though it was conceded that instruction No. 2 is subject to the objection now made to it, and that the trial court should have given instruction "A" tendered by the railroad company to cure this alleged defect in No. 2, neither of which is conceded. On the other hand we most earnestly insist that in neither of such respects was prejudicial error committed in this respect. We feel confident the court will never reach the question, upon this branch of the case, as to whether instruction No. 2, sufficiently meets the requirements of the Employers' Liability Act, for the reasons mentioned in the preceding arguments; but if our confidence in this respect be misplaced, and the court does come to that question, then our contention is that the instruction No. 2, properly presents this issue to the jury under the facts of this case, and especially so in the absence of evidence heard or offered by the railroad company upon the question of present cash values, and in the absence of a proper instruction offered on this issue.

It is true that in the Kelly and Gainey cases, this court held that the measure of recovery is the present cash value of the pecuniary loss, but it did not decide that the instructions in those cases would have been held erroneous if they had stopped where the instruction in this case stopped. The error consisted, not in giving that portion of the instruction the trial court gave in substance here, but in the extension of it made by the trial court, and the refusal of the trial court in those cases to give offered instructions, which additions and offered instructions the Court of Appeals treated as properly raising the question, and, having expressly decided that the present cash value was not the proper criterion of recovery, this court reversed those cases upon that ground alone. We have shown that the Court of Appeals did not so treat the question in the instant case, and did not treat it as before it or decide it at all, and therefore the very foundation upon which the Kelly and Gainey cases rest, does not exist in this case and they have no application here. If this question is reached in this case, a new foundation must be built upon the independent proposition as to whether Instruction No. 2 does or does not submit to the jury in proper form, the question of compensation for the pecuniary loss the widow sustained. The question comes up squarely to this court, and the instruction must be construed by this court independently, stripped of any construction by the Court of Appeals of Ken-

tucky, in the light of the Employers' Liability Act, and general principles of law. That part of instruction No. 2 now criticised, is as follows:

“* * * the measure of recovery, if you find for the plaintiff being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased for the loss of the pecuniary benefits she might reasonably have received if the deceased had not been killed, * *”.

The court will bear in mind that under the practice in Kentucky instructions to juries are required to be in writing, and are not given with the elaborate comment upon the evidence, which is generally followed in some of the Federal courts. In the trial courts in Kentucky, the instructions are usually confined to a statement of general propositions, with as little reference to particular items of evidence as is possible. The instruction in this case is in such form, a form approved by the Court of Appeals of Kentucky. It does not attempt to lay down any precise formula upon which the jury shall make its award, other than the direct and positive limitation that it shall be confined strictly to an amount which will fairly and reasonably compensate the widow for the loss of pecuniary benefits she might reasonably have received from her husband had he not lost his life.

It is to us, a rather significant fact that in all cases under the Employers' Liability Act which have reached this court for review, and in which a rule

has been prescribed for the guidance of trial courts in giving instructions, and in which instructions that were given have been criticised by this court and found erroneous, this general rule prescribed by the trial court in the instant case and embodied in the instruction given, has been invariably adopted, approved, and prescribed by this court; and the errors committed by the trial courts and pointed out by this court have almost, if not invariably been found in the efforts of such courts to extend their instructions beyond those limits so as to include or exclude something which should not properly have been included or excluded. In nearly all of them this court clearly intimates that if the trial court had stopped where the trial court stopped in the present case, the instruction would have been correct and would have been approved. This appears in the very first case in which the question of measure of damages arises, *Michigan C. R. Co. vs. Vreeland*, 227 U. S. 59, at page 72 this court said:

“* * They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court did not stop there, but further instructed the jury that” etc.

In *American R. Co. vs. Didricksen*, 227 U. S. 145, the court said:

“* * * The damages recoverable are limited to such loss as results to them because they

have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained. The court below went beyond this limitation by charging the jury that they might, in estimating the damages 'take into consideration,' etc.

In *Gulf, Col. & S. F. R. Co. vs. McGinnis*, 228 U. S. 173, it is said,—

"The jury were instructed if they found for the plaintiff, to return a verdict for such a sum as would justly compensate the persons for whose benefit the suit was brought for such pecuniary benefits as they might believe from the evidence the beneficiaries had a reasonable expectation of receiving from the decedent, if his death had not been so occasioned. They were further told," etc.

The same thing appears in *Kansas City S. R. Co. vs. Leslie*, 238 U. S. at pages 603-604, and *Norfolk & Western R. Co. vs. Holbrook*, 235 U. S. 625.

In an effort to avoid the pitfalls found by this court in each of the cases cited, the trial court in the present case, stopped where this court clearly intimates the trial courts should have stopped in the above cases. And the complaint now made of the instruction is that it failed to take into consideration the present cash value of such compensation, and failed to tell the jury that it should reduce its award to a present cash basis. We submit that the instruction as given embodies this idea, sufficiently, and that an extension of the instruction by calling par-

ticular attention to that basis of calculation was not necessary.

When reasonable men are directed to make a reasonable award as compensation for pecuniary benefits a widow might reasonably have received from her husband had he lived, and have before them the facts upon which to base such an award, they may be left to do that which is reasonable, and after they have acted, the presumption is, always, that they have acted reasonably. Men of ordinary intelligence, in the usual and ordinary walks of life, as well as we lawyers, know and appreciate the "earning power of money"; they know as well as we know that a present sum in hand is worth more, and will naturally be less on its face, than the same sum made up of future installments. Many and many of them have been taught this lesson in the hard school of experience, when they have discounted their notes or their wages, or borrowed money upon their little all, sometimes mortgaging their future at varying rates of discount, in order to obtain the present sum necessary to carry on their various lines of endeavor, or to tide them over a rainy day.

In this case the jury had a mass of evidence, placed before them by witnesses for the administrator to give them a basis of calculation. They were given the age, earning power, health, habits, character, occupation, life expectancy, and mental and physical disposition to labor on the part of the deceased,

to assist them in arriving at a verdict and as forming some basis upon which to make their calculations. The administrator did not offer, and was not called upon to offer any evidence by way of expert witnesses or standard interest and annuity tables, upon which to base a reduction to present cash values, being content to leave that phase of the case to the sound discretion and business experience of the men composing the jury. The railroad company had the right to introduce such evidence, if it so desired, but did not do so, thereby announcing its willingness to leave the question to the sound discretion and business experience of the jury. With all the evidence before them which either side desired to offer, the jury was directed, if they found for the plaintiff, to fix the damages as shown by the instruction given. If the railroad company had availed itself of its legal right to introduce evidence to minimize the award of the jury, the verdict might or might not have been less than the one that was returned, but having placed its reliance upon the judgment of the jury so far as this particular feature is concerned, it cannot now complain that the present cash value as fixed by the jury, from their own knowledge and experience of local conditions, is larger than the railroad company's pre-conceived notion of what that sum ought to be, or what it could have proven it would have been had it introduced proper evidence,—and that in its last analysis is what the principal contention of the railroad company amounts to.

The jury was instructed from the evidence before them, to fix a sum which would reasonably compensate the widow for the loss of pecuniary benefits she might reasonably have received from her husband. The evidence showed that the benefits she had been receiving and which she might reasonably expect to receive, came in monthly installments as her husband received his wages from his employer. The jury was not instructed to make an award by multiplying the amounts she was receiving or which she might thereafter receive each year by her husband's life expectancy, or by such number of years as he might be expected to live. If this had been done, then it would perhaps have been necessary to qualify the instruction by directing the jury to reduce this sum so found to its present cash value, in order to get the proper amount to be allowed. But the jury was instructed to allow a lump sum which would afford the widow compensation for the pecuniary loss she had sustained, and this would naturally be a sum represented by future installments reduced to a present value, otherwise it would be more than reasonable compensation.

If it be self-evident, and it is, "that a given sum of money in hand is worth more than the like sum of money payable in the future" such self-evident fact is as clearly evident and palpable to a jury as it is to us; if it be a fact, and it is, "that the putting out of money at interest is at this day so common a

matter that ordinarily it cannot be excluded in determining the present equivalent of future payments", then certainly it is presumed so common a matter is just as well known to men composing an intelligent jury as it is to us; if it be a fact and it is, that reasonable men "even from selfish motives would probably gain some money by way of interest upon the money recovered", such fact is equally as well known to an ordinary jury of reasonable men, possessing the same selfish motives we all possess more or less, as it is to us. And, when such a jury of reasonable men are instructed to award in one sum an amount which will afford compensation for the loss of pecuniary benefits, which the evidence shows was being received in future installments, the presumption is inevitable that in making such award the jury will take all those commonly known and thoroughly understood facts into consideration; that as reasonable men they will do what reasonable men are expected to do, and will make their calculation and base their award upon reasonable compensation and no more.

The railroad company, in this case, merely assumes that the jury has not done this, without any real foundation for its assumption. It calculates interest on the principal sum allowed at six per cent interest, and, because this results in a paper income of \$1,500 a year, which it claims is more than the widow would have received from her husband had

he lived, it assumes that therefore the jury has not done that which reasonable men were expected to do under the same circumstances. But who says the widow might not have received the benefit of more than \$1,500.00 a year from her husband had he lived? And who says the jury made its calculation upon the basis of six per cent interest? The jury in this case, composed of men from all walks of life, some from the country, some from the city, were familiar with local conditions. They knew that if the widow received her income in monthly installments as she did when her husband was alive there would be no taxes to pay,—but with a sum of money paid at one time there would be state, county and city taxes to pay amounting to from two and a half to three per cent of the full amount in hand, and this is true whether the sum was invested at four, five or six per cent interest, unless it was invested in non-taxable securities such as government bonds bearing a low rate of interest. At the time this verdict was rendered Liberty Bonds with their three and a half and four per cent interest net were unknown, and U. S. bonds bearing three per cent interest sold at a premium, so that even a three per cent Government bond, tax free, netted the investor less than three per cent. Savings banks, it is true were paying four per cent on an average, but money deposited in such banks in Kentucky had to pay the same ad valorem tax that it would have to pay if invested in stocks,

bonds or other securities bearing six per cent or any other rate of interest. In other words, the jury knew that any honest person who did not attempt to cover up his property to avoid taxes, could not reasonably expect to get safe investments yielding to the investor more than from two and a half to three per cent net over and above costs, taxes, etc., and the jury had the right to take those facts into consideration in making its verdict in this case. And the jury had the right to base its calculation upon that fact, commonly known to all "that as a rule the best and safest investments, and those which require the least care, yield only a moderate return".

But enough of this. The time has passed in this case to make calculations of how much interest the widow will get, or to say in what forms she should invest her funds, or what it will cost her to purchase an annuity; or to present life tables or annuity tables, or expert witnesses upon the question of what sum will yield an income equal to what the widow was getting—all of those things should have been presented to the jury trying the case and this court will not stop to look into them. This court has to deal with questions of law, and none of these facts, however important they may have been originally, are subject to review in this court upon writ of error to state courts. They involve strictly questions of fact for the jury and for the trial court, to determine, and not questions of law for consideration by this court.

We submit that the criterion of recovery was amply set forth in the instruction given; that the jury could not have been misled thereby; and that the instruction given is in accord with the rulings of this court in the various cases cited, and with the Employers' Liability Act, under which the action is maintained.

If the instruction does not submit the proper criterion in every detail, then it devolved upon the railroad company to ask a charge upon the point wherein it fails so to do, or to prepare and offer a proper instruction upon the question, neither of which was done, and instruction "A" offered by the railroad company was not offered or ever intended to cover the question now raised in the Assignment of Errors. It was not only not error on the part of the trial court to refuse to give instruction "A", but it would have been reversible error against the administrator if it had been given.

The railroad company has, both in the trial court and in the Court of Appeals, continuously and strenuously contended for the application of a rule which would limit the jury to allowing the widow a sum which, invested at six per cent interest would yield only \$40.00 or \$50.00 per month to the widow, or, failing in this, a sum which invested at *six* per cent interest would yield an income equal to what the jury might believe was the widow's annual pe-

cuniary loss. Instruction "E" tendered on the second trial at the same time instruction "A" was tendered (Record, 138), shows such effort, and was intended to limit the jury to a \$40.00 per month income on a strict six per cent basis. That instruction though its objection is not now complained of, is as follows:

"The Court instructs the jury that if they shall find for the plaintiff they cannot award damages against the defendant in excess of the sum of \$13,737.60 the pecuniary loss shown to have been sustained by Myrtle S. Holloway, for whose benefit this action is brought, by the death of the *defendant* (decedent) John G. Holloway".

This sum of \$13,737.60 is arrived at by multiplying the \$40.00 a month, or \$480 a year by the decedent's life expectancy. In the Court of Appeals it had raised its amount to not exceeding \$50.00 a month or \$600.00 a year and contended for a limit of \$17,166.00, arrived at, as the Court of Appeals said, by multiplying the life expectancy by \$600.00 a year. And this, bear in mind, was the railroad company's contention. The instruction quoted above, and the argument which the Court of Appeals states was made before it, shows the earnest effort of the railroad company to have established a strict six per cent basis. Instruction "A" offered by the railroad company, and refused by the court, which refusal is now assigned as error on other grounds as an afterthought, is a part and parcel of the same effort, pre-

sented in another form. As stated, the idea was to procure the establishment of a strict six per cent basis of calculation with a limit of \$40.00 or \$50.00 a month if it could be obtained, and if not, then to procure the establishment of a strict six per cent basis, limited only by what the jury might believe from the evidence the annual pecuniary loss of the widow was. Instruction "A" was presented solely upon this idea as we contend, and the record we submit sustains this contention, and all the rest of the instruction was but a part and parcel of, and incidental to that one idea, and inseparably connected with it. There was never any request to charge the jury, specifically, upon the question of reducing the amount of recovery to a present cash value, nor any claim made that instruction "A" offered was intended to cover that question. There was never even any request to give the latter part of instruction "A" separated from the first part, and it was never intended by the railroad company that it should be separated, and given as a separate instruction. This is clearly shown by the way the last part is worded,—"*And the Court further instructs the jury that the amount so awarded by them should be*", etc. The last part of the instruction is connected with the first part by the conjunctive "*and*"; also by the words "*so awarded*", thus clearly referring to the award on a six per cent basis carried in the first part of the instruction. And our contention that the instruction was never intended

to be separated and was offered solely with the object of establishing a six per cent basis, is further evidenced by the fact that in the Court of Appeals the last part of the instruction "A" was never mentioned or referred to in argument or otherwise, and the instruction is not even mentioned or referred to, directly or indirectly, in the opinion of the Court of Appeals.

That a six per cent basis, or the "legal rate" of interest is not the proper one is held by this court in the Kelly case, *ubi Supra*, where at page 490, the court says,—

"We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest, that is, the rate limited by law beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment *."

It would, therefore, have been error for the trial court to give the instruction "A" tendered by the railroad company, upon this ground.

If the answer be attempted that if six per cent interest is not the correct rate the court should have given an instruction saying what the correct rate should have been, we reply it is not for the court to

name any rate by which the jury is to be controlled. The rate is a question for the jury to apply taking into consideration local circumstances and conditions, and it is only competent for the court to so instruct the jury as to leave them the judges of this question. And they were left to determine the question when instructed to award reasonable compensation for the pecuniary loss suffered by the widow, without limiting them to any specific rate of interest in making their calculations.

The first part of this instruction is also objectionable in that it attempts to prescribe a recovery for such an amount as it had been proven the widow "*received from her husband in his lifetime*". It was not a question of what she had received from her husband in his lifetime, because she had already received that, and no one would contend that she was entitled to receive it again. It was competent to prove what she had been receiving from her husband during his lifetime as bearing upon what she might reasonably receive in the future; however, the jury was not bound to take that as an absolute guide,—but only had the right to consider it along with other facts established by the evidence. But the jury had the right to say that under the facts shown, the wife might reasonably expect to receive more or receive less in the future than in the past. If the jury should conclude she might receive less, then this instruction would prove prejudicial to the railroad company; if

more, then it would prove prejudicial to the administrator; in either event, it would have been error to give it.

It might or might not have been proper to give a separate instruction, if one had been offered, embodying to some degree the idea advanced in the latter part of the instruction "A", but certainly it is not competent for one to offer an instruction upon a general proposition not proper to submit at all, or if proper, already submitted in another instruction, and then complain that in the improper instruction there was incidentally mentioned a correct idea which the court should have extracted and presented to the jury. We may concede that where an instruction upon a given point, upon which the jury should have been instructed is properly asked, and one is offered which is only improper in form, then under the practice prevailing in Kentucky, (*C. & O. R. Co. vs. DeAlley*, 241 U. S. 310), it is the duty of the court to give a corrected instruction covering the question. But that is not the case here at all. The objection to this instruction "A" does not go to the form, but to the very subject of it. The subject of the instruction is the establishment of a six per cent rate of interest; it was not proper for the court to establish six per cent, or any other rate as a matter of law, and therefore, neither the instruction asked, nor one embodying the principle in proper form could have been given or should have been given. Nor was the court

required to search the instruction to ascertain if there might be some small portion of it picked out from the whole, and given in some form separately.

And certainly this instruction, as offered, possesses the one fatal defect that it attaches a conclusive importance to the life tables presented in evidence, and makes them the absolute guide for the jury, when they are only to be considered along with other evidence. It was not proper for the court by an instruction to fix the life expectancy of the decedent at 28.62 years, as this instruction attempts to do. Even the life tables differ on this score. As the Court of Appeals shows in its opinion, according to one standard table the life expectancy of the deceased was "something over 28 years" while according to another it was "something over 31 years", (Record, 171), and the court adopts 30 years as an average. Manifestly then, placing a limit of 28.62 years would have been error. This is expressly held in *Vicksburg & M. R. Co. vs. Putnam*, 118 U. S. 545, quoted from and approved in the *Kelly* case, 241 U. S. 491.

Moreover, an ordinary reading of the instruction would lead no court to believe, or have reasonable grounds to believe that the object sought by this instruction was to place before the jury the question of present cash value, and it was only after this court decided the *Kelly* and *Gainey* cases that the railroad company attempted to place this construction upon the language employed therein.

And, finally, the last part of the instruction as offered, attempts to place upon the shoulders of the jury a long and tedious mathematical calculation which no juror,—even if competent to make it which is extremely doubtful—should be called upon to make. Certainly no juror could make the calculation upon the last part of the instruction without coupling it with the first part. And there is no doubt that it would have been error to give the first part. The only other way they could have made it would be to have before them proper expert testimony, or competent annuity tables as this court has suggested.

III.

This brings us to the Third and last general proposition outlined by us at the beginning- to-wit: The alleged error in allowing a recovery for loss to the estate of the deceased, in addition to the loss sustained by the widow individually. In this connection it is contended by the railroad company as shown by its assignment of errors,—First, That the Court of Appeals erred in not condemning the measure of damage instruction, as given, and in not condemning the trial court for its refusal to give instruction “A” heretofore quoted, as a result of which the jury was misled in this respect; and, Second, Certain language of the Court of Appeals is set forth, which shows, it is alleged, that the Court of Appeals misconstrued the

Employers' Liability Act, and permitted a recovery for loss to the estate of decedent as well as for the pecuniary loss the widow sustained individually.

In the lower court the fact was mentioned and commented on at length in the argument that the record showed the jury committed this fault, and that a recovery on this basis was allowed by the lower court because it was embraced as one of the elements of damage in the Amended Petition filed in the trial court when it was alleged that the widow had a "pecuniary interest in his life and in *his estate*". (Record, 129). We presume the same argument will be made here. If it is, it is sufficient to answer that while a plaintiff certainly cannot recover damages upon any ground not pleaded, it does not follow that the law will permit a recovery for every ground that is pleaded. The grounds of recovery allowed by the court when submitted to the jury by instructions are not to be looked for in the pleadings of either side, but in the instructions given by the court. The railroad company set up by pleading that it took a full vote of a jury of twelve to decide this case, but when the court came to instruct the jury, the jury were told that nine or more of their number might agree on a verdict. There would be just as much force in a contention that because the railroad company alleged it, therefore the court adopted and followed its allegation, the instruction shown to have been given to the contrary notwithstanding, as there

is in the argument that because we alleged that the widow had a pecuniary interest in her husband's estate, that therefore the court adopted and allowed a recovery on that basis. This entire record shows that under the evidence and under the instructions, the jury was confined in its allowance to the pecuniary loss of the widow, and was not authorized to make any award for loss to the estate. And, while this allegation does appear in the amended petition, it has never been seriously contended by the administrator or his counsel, that the administrator might recover for loss to the estate of the decedent, but it has always been conceded that in this case the administrator could recover for the benefit of the widow, only the pecuniary loss shown to have been sustained by her individually and nothing more.

The instructions given by the trial court on this question has been copied at another place in this brief. In its opinion the Court of Appeals said,—

“Counsel for the company argue that the wording of this instruction was ‘calculated to mislead the jury and to induce them to allow the widow for the damage to the decedent’s estate as well as for the damage she sustained individually’; we do not think the instruction is at all susceptible of this construction, or that the jury could have understood in assessing the damages that they might estimate the loss suffered by the decedent’s estate as well as the loss sustained individually by the widow.”

In *Michigan C. R. Co. vs. Vreeland*, 227 U. S. 59, at page 70, it was said,—

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. * *"

In *American R. Co. vs. Didricksen*, 227 U. S. at page 149, it was said,—

"The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained."

In *Gulf C. & St. F. R. Co. vs. McGinnis*, 228 U. S. 175, it was said,—

"The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss."

We have heretofore shown that in so far as the alleged error now under consideration is based upon the claim that the jury allowed more than the evidence justified and exceeded the limits authorized by the instructions, or if the alleged excess does not appear as a matter of law, then no question is presented for review by this court. So that, the questions to be discussed here are,—Is the instruction now under consideration and given by the trial court, susceptible of the construction now placed upon it by the railroad company? Is there anything in the language employed by the trial court which could have lead

the jury into believing they had the right to award damages for the loss to decedent's estate as well as for the pecuniary loss of the widow individually. A complete answer to these questions is found by a simple perusal of the instruction given. It told the jury if they found for the plaintiff the measure of recovery was, "such an amount as will fairly and reasonably compensate the *widow* of the said John G. Holloway, deceased, for the loss of the pecuniary benefits *she* might reasonably have received if the deceased had not been killed". There is not a word in this instruction which refers to loss to the estate of the decedent, and the sole and only thing mentioned is the loss of the pecuniary benefits of the widow. The measure applied is the identical and exact measure which the court holds to be proper in the cases above quoted from. And the Court of Appeals of Kentucky recognizes the fact that it is the pecuniary loss of the widow that compensation must be made for, and not the loss sustained by the estate of deceased throughout its opinion, and in the extract from it above quoted.

Not only is it contended under the first assignment of error that instruction No. 2 is erroneous in allowing a recovery for damage to the estate, but it is there claimed that instruction "A" offered by it and heretofore set forth herein, would have cured such alleged error. We confess our inability to see this point. If instruction No. 2 is objectionable or subject to criticism in this respect, then certainly in-

struction "A" offered and refused is subject to identically the same criticism, and falls into the same error. If under instruction No. 2, the damage to the estate could be considered by the jury, then under instruction "A" it could likewise be considered. There is not a word in the offered instruction "A" about excluding from consideration the loss to decedent's estate. Both instructions recognize that the proper measure of compensation is for the loss of pecuniary benefits sustained by the widow. In No. 2 it is expressed by the words "for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed"; in the instruction offered the wording is the pecuniary benefits Mrs. Holloway "had reasonable expectation of receiving from him if he had not been killed". In neither is damage to the estate included or excluded, except as they are excluded by the words "reasonably compensate the widow of said John G. Holloway for the loss of the pecuniary benefits *she* might reasonably have received" as found in No. 2, and the words "pecuniary benefits which *Mrs. Holloway* * * * had reasonable expectation of receiving" in instruction "A". In the one instance the beneficiary is referred to as "the widow of John G. Holloway, deceased", while in the other she is referred to as "Mrs. Holloway" and that is the only difference between them in so far as the objection is concerned that damages for loss to the estate was improperly included or authorized.

If the railroad company desired an instruction given to the jury, particularly calling its attention to the difference between loss to the estate and loss to the widow, and in express and direct words excluding loss to the estate, then under the well recognized rule of practice prevailing in both State and Federal courts, it should have offered such an instruction. If it had offered such an one no objection would have been made to it, we are certain, either by counsel for the administrator or by the court and it would have been given. But it did not offer one and instruction "A" which it now claims presented this question cannot by any manner of means be construed as such an instruction. We have heretofore shown the only object of instruction "A" was to establish the six per cent basis of calculation.

There remains for discussion only those parts of the first and the third assignments of error as find fault with certain passages quoted at random from the opinion of the Court of Appeals herein.

The court has long since observed that the position of the railroad is this,—The widow testified on the trial that at the time of her husband's death she was actually paying out for board about \$25.00 per month, and for clothing and other necessities something over \$15.00 a month, making a total of \$40.00, or say \$50.00 a month, or \$600.00 a year; that because of this evidence, the damages recoverable ought to have been limited to a sum which would afford her

compensation for the loss of this sum and no more. In other words the railroad company's position is that a recovery under the Employers' Liability Act is limited to what the beneficiary was receiving and expending for absolute necessities, for that is what it amounts to. The administrator on the other hand has always contended that the award is to be based upon reasonable compensation for the loss of pecuniary benefits the widow is shown by the evidence to have been deprived of, and that such pecuniary benefits do not mean and we are not to be confined to what she was actually expending for bare living necessities, but also extend to and cover what the husband was paying or giving to her, and what he expected her to have the benefit of out of his wages for any other purpose, based of course upon what the evidence shows in this connection. And it is this difference, as we see it, that forms the present objection to the language employed by the Court of Appeals.

The assignment of errors, (Record, 221), complains that the Court of Appeals held, the "measure of damage is the amount which the deceased would probbaly have earned during his life for their benefit" and that "to this may be added, according to some cases the amount which he probably would have accumulated and which they might reasonably have expected to inherit". It is unnecessary to discuss here whether the language just quoted exceeds, or does not exceed the limits presented by the Employ-

ers' Liability Act, because that language is not the language of the Court of Appeals, but is employed by Tiffany in his work "Death by Wrongful Act" in section 160, and quoted, along with Section 158 in the court's opinion herein. To the extent that these two sections from Tiffany are followed in its opinion they may be considered as having been approved by the court, but by merely quoting these two sections the court did not adopt them as its own ruling on the question under discussion, except to the extent that the opinion on its face shows. We may, therefore, leave these two quotations out of consideration altogether.

The other three passages quoted as from the opinion,—two of them in the last part of the first assignment of errors and one of them in the third assignment,—do appear in the opinion, but isolated and separated from their context. They are found in the following paragraph which we quote in full as the ruling of the court on this question:

"We do not of course know by what method of calculation the jury arrived at the amount awarded, but if, in reaching a conclusion they considered, as they had a right to do, the amount in excess of living expenses received by the widow out of her husband's wages when he was getting a hundred and fifty and two hundred dollars a month, the pecuniary loss sustained should not be limited to the amount required for her support and maintenance, because he gave her all of his wages, and the savings were put in bank to their joint credit. So that it may fairly

be said that at the time of his death *she was receiving as pecuniary benefits from him* not only her support and maintenance of fifty dollars a month, but in addition thereto one-half of the savings, or in other words, one hundred dollars a month."

This conclusion of the court is not a mere speculative conclusion, but is based upon the evidence heard at the trial, and upon the findings of fact previously set forth by the court in its opinion. It will be observed the court expressly disclaimed any knowledge as to the basis of calculation adopted by the jury, and simply said the jury had the right to consider these facts along with others. The method of calculation adopted by the jury does not appear, and in the nature of things could not appear in the verdict of the jury. The jury may have concluded the pecuniary benefits of the widow amounted to a greater sum per month than the \$100.00 mentioned by the court, and if so who will say they had no right to do so under the evidence in this case. The Court of Appeals has not said so, nor will this court say so now.

At any rate, we most earnestly insist that under the evidence heard in this particular case, regardless of what may be true in some other case, the construction and application of the Employers' Liability Act as construed and applied by the above quotation from the opinion herein, is strictly in accord with both the letter and spirit of that act, and with the construction and application given it by this court in the vari-

ous cases that have come before it. The wife had just as much pecuniary interest in the amount being deposited to their joint credit in bank as the husband had, and the fact that she only actually spent \$40.00 or \$50.00 a month did not make her interest any the less, or deprive her of that interest any more than the fact that the husband was spending no more of it deprived him of any interest in the balance. It was the joint property of both.

We do not contend that, as a matter of law the surviving widow and children, where there are children or the surviving widow alone where there are no children may recover, or have recovered for their benefit the same amount that the administrator might recover for loss to the estate of the deceased in those states where such loss may be recovered by the estate; not at all. Nor do we claim in this case that the widow would be entitled to what the deceased would have earned or what he might reasonably be expected to save. That is not the test. The recovery should be limited and was limited in this case to compensation for the widow's loss of pecuniary benefits; a loss that can be measured in dollars and cents; a loss of money values,—“an eye for an eye and a tooth for a tooth” as it were. When the beneficiary, a widow, has been deprived of pecuniary benefits which the evidence shows she might expect to receive, and was actually receiving, as the result of the negligence of the employer, it is the duty of the employ-

er to render to that beneficiary the money value of the actual pecuniary benefits she has lost. The widow is entitled to nothing more than that; but she is entitled to that as far as a jury can arrive at it under the evidence placed before them.

No court has ever attempted to lay down any hard and fast rule by which this loss shall be measured. As said in the Vreeland case, *supra*, "no hard and fast rule by which pecuniary damages may in all cases be measured is possible"; and in the Holbrook case, *supra*, "the ascertained circumstances must govern in every case". The ascertained circumstances of this particular case are found in part in the opinion of the Court of Appeals. They are exceptional in many respects, and constitute exceptional grounds for the allowance of large pecuniary damages to the surviving widow.

If the position of the railroad company is the correct one, then because in the management of her personal affairs the wife practiced the most rigid economy in order to save what the husband provided for her, she is to be confined, in the event of his death, not to what she was receiving and had the right to expect to continue to receive, but to what she was thus actually spending for her necessities, and this is to be her limit forever and a day. If on the contrary she had been guilty of extravagance, and spent her part of the funds in the world of fashion and among high livers she would be entitled to a greater sum

on this account. Such is not the rule. It is not what either was spending, the one under economical administration, or the other in extravagance that controls. It is a question of what the pecuniary benefits lost are, regardless of what use the widow made of those pecuniary benefits when she received them.

In this case the Court of Appeals simply held that the jury had the right to consider, in making up its verdict, what the evidence heard on the trial showed the widow was actually receiving from her husband's wages, and that the amounts she was thus receiving in actual pecuniary benefits amounted under the evidence to at least one hundred dollars per month. This is not necessarily all the pecuniary benefits lost by her, nor does the Court of Appeals so hold, but it amounted to at least this much, and the court held, rightly we submit, that these "ascertained circumstances" might properly be considered by the jury in making up its verdict.

The amount allowed by the jury represents no part of the loss to the estate of the decedent, but represents only the loss of pecuniary benefits sustained by the widow; both the Circuit Court and the Court of Appeals held this to be the fact, and held also that the instructions limited the jury to compensation for the widow's loss only. Upon what possible ground then can it be claimed that the jury awarded damages for loss to the estate of the deceased, as well as

the loss of pecuniary benefits sustained by the widow individually? None. If the jury did not have the right to consider the elements of damage mentioned in the opinion of the Court of Appeals then the widow is not entitled to compensation for the loss of pecuniary benefits, and the act in question and the decisions of this court are but sounding brass and tinkling cymbals.

Upon the whole case we submit that the railroad company had a fair and impartial trial in this case; that the record, especially as to those questions presented in the assignment of errors herein, is free from prejudicial errors; and that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JAS. W. CLAY,

Counsel for Defendant in Error.

Of Counsel—

J. F. CLAY,

A. Y. CLAY.

the substitution of correct instructions for defective ones requested, is a question of state law not reviewable by this court in an action under the Employers' Liability Act.

When not based upon an erroneous theory of federal law, refusal of the state court to reverse a judgment upon the ground that the damages are excessive is not reviewable here in an action under the Employers' Liability Act.

168 Kentucky, 262, affirmed.

THE case is stated in the opinion.

Mr. Benjamin D. Warfield, Mr. N. Powell Taylor and Mr. John C. Worsham for plaintiff in error.

Mr. Jas. W. Clay, Mr. J. F. Clay and Mr. A. Y. Clay for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Holloway, a locomotive engineer, was killed on the Louisville and Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the Federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of \$32,900. The judgment entered thereon was reversed by the Court of Appeals (163 Kentucky, 125); and, at the second trial, a verdict was rendered for \$25,000. Judgment was entered on this verdict, and was affirmed with ten per per cent. damage by the Court of Appeals (168 Kentucky, 262). The case comes here under § 237 of the Judicial Code. The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another¹ by which the trial judge had denied to the com-

¹ The instruction given was: "The measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly

pany the benefit of the rule declared in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 491, that in computing damages recoverable for the deprivation of future financial benefits, the verdict should be based on their present value.

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of \$50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated if he had lived out his allotted span" of life.

First: The instruction given, though general, was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate" the widow "for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits payable at

and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: \$50,000.00."

The instruction refused was: "The court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given; and none was requested except an instruction, not now insisted upon, limiting the recovery specifically to \$13,737.60.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY *v.* HOLLOWAY, ADMINISTRATOR OF
HOLLOWAY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

No. 209. Submitted March 15, 1918.—Decided April 15, 1918.

In an action under the Employers' Liability Act on behalf of the widow of a deceased employee, an instruction that the measure of damages should be such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death, *held* correct, as a general instruction, leaving to the defendant the right to have it supplemented by another indicating that, in estimating the amount of such compensation, future benefits must be considered at their present value.

Under the Employers' Liability Act, defendant is not entitled to have the jury instructed, as matter of law, that the value of money to the beneficiary should be measured by a specific (the legal) rate of interest, or that the duration of future benefits could not have exceeded the life expectancy of the deceased employee, as given by an actuarial table.

Whether the state court has obeyed a local rule of practice requiring

different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate." The language used was similar to that in which this court has since expressed, in *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, p. 489, 'the measure of damages which should be applied.'¹ The company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) that money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was 28.62 years,—the life expectancy of the husband according to one of several well known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, pp. 490-492. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one (see *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U. S. 310, 316), was applicable in the case at bar. That is a question of state law, with which we have no concern.

¹ "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."

In the *De Atley Case*, the Kentucky Court of Appeals assumed for the purposes of its decision that the local rule applied, and was thereby led to decide a question of federal law. Consequently we had and exercised jurisdiction to review its decision upon that question.

Second: The third assignment, in so far as it relates to the refusal of the Court of Appeals to reverse the judgment "on the ground that the damages are excessive," is not reviewable here. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 86. It does not appear in the case at bar, as it did in *Chesapeake & Ohio Ry. Co. v. Gainey*, 241 U. S. 494, 496, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of federal law. As to the alleged error of the Court of Appeals in holding as part of the benefit the widow might have received "not only her support and maintenance of \$50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated," it is a sufficient answer that the trial court did not give any instruction on that subject, nor was it requested to give any, and that the Court of Appeals did not hold as stated that the widow could share in the loss to the estate. It held that the pecuniary benefit which the jury was entitled to consider in estimating the widow's damages was not merely what she would have spent for maintenance and support, but what she would otherwise have received from her husband.

Affirmed.